SUPREME COURT OF THE UNITED STATES.

No. 423.

THE DOVER FIVE CENT SAVINGS BANK, EDWIN D. MORGAN, ET AL., AND THE BOATMEN'S SAVINGS INSTITUTION, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

Petition.

THE DOVER FIVE CENT SAVING BANK
vs.
THE UNITED STATES.

To the Honorable the Justices of the Court of Claims of the United States:

Respectfully represent "The Dover Five Cent Savings Bank," a corporation duly eslablished by the laws of New Hampshire, having its place of business at Dover, in said State; that they are the holders in good faith, and the owners for a valuable consideration, by them paid, of two several drafts or bills of exchange, made by Russell, Majors & Waddell, (whose full names and residences are unknown to the claimants,) at the times severally of the respectives dates thereof, upon the Honorable John B. Floyd, who, at the dates of the said several acceptances, and at the times of the acceptance thereof, was Secretary of War of the United States; which said several drafts or bills of exchange were by the said John B. Floyd, in his official capacity, and in behalf of the said United States, duly accepted, the said two drafts amounting to the sum of twenty thousand dollars. And the said claimants represent that the said bills were, in their belief, registered at the War Department or entered upon its books or papers, at or about the time or times at which the same were accepted; that they were presented for payment at the several times when and at the place at which they were severally made payable; that payment thereof was refused. They also represent that the United States are legally and equitably indebted to them in the full and just
2 amount of the said two acceptances, and are by law and in equity bound to pay the same, together with the damages and interest thereon, at the rate of seven per cent. per annum, upon each and every the said bills from the several maturity thereof. Your petitioners aver that the bills are as hereinafter set forth and described, with the endorsement and acceptance thereon, as follows, to wit:

$10,000. WASHINGTON CITY, *July* 10, 1860.

Six months after date, pay to our own order, at the Bank of the Republic, New York city, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.

RUSSEL, MAJORS & WADDELL.

To Hon. J. B. FLOYD, *Scretary of War*.
REC. 423—1

Endorsement.

"RUSSEL, MAJORS & WADDELL."

Acceptance.

No. 47. "WAR DEPARTMENT, *July* 16, 1860.

Accepted:

J. B. FLOYD,
Secretary of War.

$10,000 WASHINGTON CITY, *July* 16, 1860.

Seven months after date, pay to our own order, for value received, at the Bank of the Republic, New York city, ten thousand dollars, and charge to account of our transportation contract of the 12th day of April, 1860.

RUSSEL, MAJORS & WADDELL.

To Hon. J. B. FLOYD, *Secretary of War.*

Endorsement.

"RUSSEL, MAJORS & WADDELL."

Acceptance.

No. 53. WAR DEPARTMENT, JULY 16,1830.

"Accepted:

JOHN B. FLOYD,
Secretary of War.

The said claimants aver that the said John B. Floyd, as Secretary of the War Department, and in behalf of the United States, and as the principal officer of an executive department, had authority to accept the above-named drafts or bills of exchange, and that in accepting the all and every the said bills, he acted in his official capacity, and in behalf of the said United States. And the said claimants aver that the said Floyd, in behalf of the United States, as such Secretary of War, was authorized to accept drafts oa bills of 3 exchange, of such and the like tenor and effect as the bill aforesaid, and that the said claimants, relying upon the apparent as well as upon the actual authority of the said Secretary of the War Department to make such acceptances, and upon the fact of his acceptance of the bills, became the holders and owners of the bills of exchange hereinbefore set forth and described. The said claimants also aver that they became such holders and owners, in a regular course of business, of each and every the above-described bills, before they severally matured. The said claimants also aver that they have heretofore, through the agency of Peirce & Bacon, petitioned Congress for the payment of the said bills, or for permission under which they could institute legal proceedings thereon against the United States; that so far as they are advised no action has been taken thereon by Congress, except such as may be derived from a recent enlargement of the powers and jurisdiction of the Court of Claims. They also aver that the War Department has been requested to pay the same; that a schedule or memorandum thereof has been presented; that the said department has not paid the same or any part thereof, but has wholly neglected and refused such payment. The said claimants also aver that they have at all times borne true allegiance ao the Government of the United States; that they have not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against the said government; that the same is true, so far as they have any knowledge, of Russell, Majors & Waddell, the drawrrs of the said bills; and hereupon they pray that the United States may be adjudged to pay them the amount of the above-described bills, together with their damages and interest thereon.

C. B. GOODRICH,
Counsel.

Address, 30 Court St., Boston, Massachussets.
Address of claimants, Dover, New Hampshire.
THE DOVER FIVE CENT SAVINGS BANK.
By ANDREW PEIRCE, JR.

I, Andrew Peirce, Jr., of Boston, agent for the claimants, on oath
depose and say, that no assignment or transfer of said claim, or any
part thereof, or any interest therein, has been made except as in said
petition stated; that the said claimants are justly entitled to
4 the amount therein claimed from the United States, after
allowing all just credits and offsets; and that I believe the facts as
stated in said petition are true.

ANDREW PEIRCE, JR.

DISTRICT OF MASSACHUSSETS, *June* 17, 1863.

Then personally appeared the above-named Andrew Peirce, Jr., and made oath to the truth of the above affidavit by him subscribed, according to the best of his acknowledge and belief.

Before me,

EDWARD J. BROWNE,
Commissioner of the Court of Claims of the United States.

Amended Petiiion.

And the said Dover Five Cent Savings Bank, the petitioner in the above-named case, by way of amendment to its original petition in this case, further showeth:

That the bills of exchange set forth in the petition in this case were drawn on the said John B. Floyd, Secretary of War, as aforesaid, for moneys due to the said Russell, Majors & Waddell by the United States, as contractors with the United States, at the dates, respectively, of the said bills of exchange, and the acceptances of said bills by the said John B. Floyd, Secretary of War of the United States, were made by said John B. Floyd in pursuance of his duty as such Secretary of War.

That at the dates, respectively, when said bills of exchange were drawn and accepted, and when, according to their tenor and effect, said bills became due and payable, the Government of the United States was indebted to said Russell, Majors and Waddell, as government contractors, in a much larger sum of money than the amount specified in said bills of exchange.

That the United States were indebted to the said Russel, Majors & Waddell, as government contractors, in a much larger sum than the said bills of exchange, accepted as aforesaid by the said John B. Floyd, specified, and the said bills of exchange represented an actual and bona fide indebtedness on the part of the United Sates to the said Russell, Majors & Waddell.

That at the time said bills of exchange were drawn on the said John B. Floyd, Secretary of War, and of his acceptance thereof, 5 as aforesaid, a state of hostilities was existing in that portion of the territory of the United States known as Utah. That the contract made with said Russell, Majors & Waddell, by the United States, was for the transportation of supplies for the army of the United States in Utah. That at the time said bills was drawn on the said John B. Floyd, Secretary of War, as aforesaid, and accepted by him, as aforesaid, the United States army in Utah was in imminent danger of destruction from cold and starvation. That under these circumstances it become the duty of the said Secretary of War to make every provision in his power to save the said army from destruction. That the said John B. Floyd, Secretary of War, as aforesaid, in order to save the said army of the United States in Utah from destruction, authorized said bills of exchange to be drawn by the said Russell, Majors & Waddell, and accepted the same, as he might well do for said purpose, said action on his part being necessary to save said army.

And your petitioner further showeth, that the said John B. Floyd, Secretary of War, aforesaid, had authority, by the law of the land, to make advances to said Russell, Majors & Waddell, on their said contract after their trains were ready to start, and that in pursuance of said authority, the said trains being ready to start, he authorized the said bills of exchange to be drawn by the said Russell, Majors & Waddell, and put his written acceptance upon the same as Secretary of War, as aforesaid.

That the said John B. Floyd, Secretary of War, had authority, under the laws of the United States, to ascertain and determine the indebtedness of the United States to Russell, Majors & Waddell as government contractors; that in pursuance of this authority he did determine that there was due to the said Russell, Majors & Waddell the sums respectively specified in said bills of exchange at their respective dates and acceptances, and the said bills of exchange, so drawn and accepted as aforesaid, are conclusive evidence against the United States of such indebtedness.

That the United States, at the times when said bills of exchange were drawn and accepted, were indebted to said Russell, Majors & Waddell to the full amount specified in said bills of exchange, and your petitioner has an equity to be subrogated to the rights of said Russell, Majors & Waddell, and to be paid said bills.

And thereupon your petitioner prays that the United States may be adjudged to pay your petitioner the amount of the above 6 bills, together with your petitioner's damages and interest thereon.

DOVER FIVE CENT SAVINGS BANK,
By OLIVER WYATT,
Its President.

C. CUSHING,
Counsel, Washington.

THE STATE OF NEW HAMPSHIRE,
Stafford, ss:

June 6, 1867, then personally appeared the said Oliver Wyatt, and made oath that the facts stated in the foregoing amended petition are true, according to his best knowledge, information, and belief. Before me.

[L. S.] SAM. M. WHEELER,
Notary Public.

United States Court of Claims.—Dec. term, 1866.

DOVER FIVE CENT SAVINGS BANK
vs.
THE UNITED STATES.
No. 1890.

It is hereby mutually stipulated and agreed that the above entitled case shall be submitted to the court, as of this date, on petition, amended petition, evidence, and stipulations as to evidence, with arguments for the petitioners and the United States. All of which shall be delivered to the respective judges of this court on or before the 1st day of July, 1867.

April 7, 1867.

C. CUSHING,
For Petitioner.
JOHN J. WEED,
Asst. Sol. for the United States.

In the Court of Claims.—Dec. term, 1866.

7 *Traverse.*

DOVER FIVE CENT SAVINGS BANK
vs.
THE UNITED STATES.

And now come the United States, by John J. Weed, their solicitor, and say that they are not indebted unto the said Dover Five Cent Savings Bank in the sum of $20,000, or any part thereof, in manner and form as said Dover Five Cent Savings Bank hath complained.

June 12, 1867.

JOHN J. WEED,
Asst. Sol. for the United States.

In the Court of Claims.—Dec. term, 1866.

Replication.

Dover Five Cent Savings Bank } No. 1890.
vs.
The United States.

And now the said Dover Five Cent Savings Bank come, and in reply to the traverse of the United States, filed in the above-entitled proceeding, say the United States are indebted to them in the several sums, with the damages and interest thereon, as the same are in their said petition and amended petition set forth; and that each and every the averments therein contained are true; and this they are ready to prove.

June 12, 1867.

DOVER FIVE CENT SAVINGS BANK,
By C. CUSHING,
Their Solicitor and Attorney.

8 United States Court of Claims.

Petition.

Edwin D. Morgan and others }
vs.
The United States.

To the honorable the justices of the Court of Claims of the United States:

Respectfully represent Edwin D. Morgan, John T. Terry, Solon Humphreys, all of the city of New York, State of New York, merchants and partners, under the name of E. D. Morgan & Company; that they are the holders in good faith, and the owners for a valuable consideration, by them paid, of two several drafts or bills of exchange, made by Russell, Majors & Waddell, (whose full names and residences are to them unknown,) at the times severally of the respective dates thereof, upon the Honorable John B. Floyd, who, at the dates of the said several acceptances, and at the times of the acceptance thereof, was Secretary at War of the United States; which said several drafts or bills of exchange were by the said John B. Floyd, in his official capacity and in behalf of the said United States, duly accepted the said two bills, amounting to the sum of twenty thousand dollars. And the said claimants represent that the said bills were, in their belief, duly registered at the War Department or entered upon its books or papers, at or about the time or times at which the same were accepted; that they were presented for payment at the several times when and at the place at which they were severally made payable; that payment thereof was refused. They also represent that the United States are legally and equitably indebted to them in the full and just amount of the said several acceptances, and are

9 by law and in equity bound to pay the same, together with the damages and interest thereon, at the rate of seven per cent. per annum, upon each and every the said bills from the several maturity thereof. Your petitioners aver that the bills are as hereinafter set forth and described, with the endorsement and acceptance thereon, as follows, to wit:

$10,000. WASHINGTON CITY,
August 16, 1860.

Five months after date, pay to our own order, at the Bank of the Republic, New York, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.

RUSSELL, MAJORS & WADDELL.

Hon. J. B. FLOYD,
Secretary of War.

Endorsement.

"RUSSELL, MAJORS & WADDELL.
"JNO. ANDERSON & CO."

Acceptance.

[No. 61.] WAR DEPARTMENT,
August 22, 1860.

"Accepted.

JOHN B. FLOYD,
Secretary of War.

$10,000. WASHINGTON CITY,
August 18, 1860.

Four months after date, pay to our own order, at the Bank of the Republic, New York, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.

RUSSELL, MAJORS & WADDELL.

Hon. J. B. FLOYD,
Secretary of War.

Endorsement.

"RUSSELL, MAJORS & WADDELL."

Acceptance.

[No. 63.] WAR DEPARTMENT,
August 22, 1860.

"Accepted.

J. B. FLOYD,
Secretary of War.

The said claimants aver that the said John B. Floyd, as Secretary of the War Department, and in behalf of the United States, and as the principal officer of an executive department, had authority to accept the above-named drafts or bills of exchange, and that in accepting each and every the said bills, he acted in his official capacity, and in behalf of the said United States. And the said claimants aver that the said Floyd, in behalf of the United States, as such Secretary of War, was authorized to accept drafts or bills of
10 exchange, of such and the like tenor and effect as the bills
aforesaid, and that the said claimants, relying upon the apparent as well as upon the actual authority of the said Secretary of the War Department to make such acceptances, and upon the fact of his acceptance of the said bills, became the holders and owners of the bills of exchange hereinbefore set forth and described. The said claimants also aver that they became such holders and owners, in a regular course of business, of each and every the said bills, before they severally matured. The said claimants also aver that they have been informed that Pierce & Bacon, the holders of similar bills, have petitioned the Congress of the United States for the payment thereof, or for permission under which they could institute legal proceedings thereon against the United States; that so far as they are advised no action has been taken thereon by Congress, except such as may be derived from a recent enlargement of the powers and jurisdiction of the Court of Claims. They also aver that they have called upon the War Department for the payment thereof; that the said department has not paid the same or any part thereof, but has wholly neglected and refused such payment. The said claimants also aver that they have at all times borne true allegiance to the government of the United States; that they have not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against the said government; that the same is true, so far as the said claimants have any knowledge, of the drawers and endorsers of the said bills; and hereupon they pray that the United States may be adjudged to pay them the amount of the above-described bills, together with their damages and interest thereon.

C. B. GOODRICH, *Counsel.*

Address,
30 Court St., Boston Massachusetts.
Address of claimants,
City of New York.
(Signed) E. D. MORGAN & CO.
By SOLON HUMPHREYS.

I, Solon Humphreys, one of the claimants, on oath depose and say: That no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimants are justly entitled to the amount therein
11 claimed from the United States, after allowing all just credits
and offsets; and that I believe the facts as stated in said petition are true.

SOLON HUMPHREYS.

SOUTHERN DISTRICT OF NEW YORK,
June 26, 1863.

Then personally appeared the above-named Solon Humphreys, and made oath to the truth of the above affidavit by him subscribed, according to the best of his knowledge and belief.

Before me,
(Signed) CLINTON RICE,
Commissioner of the Court of Claims
of the United States, 17 *Wall street.*

Amended Petition.

And the said Edwin D. Morgan, John T. Terry, and Solon Humphreys, the petitioners in the above-named case, by way of amendment to their original petition in this case, further show:

That the bills of exchange set forth in the petition in this case were drawn on the said John B. Floyd, Secretary of War, as aforesaid, for money due to the said Russell, Majors & Waddell by the United States, as contractors with the United States, at the dates, respectively, of the said bills of exchange; and the acceptances of said bills made by the said John B. Floyd, Secretary of War of the United States, were made by said John B. Floyd, in pursuance of his duty as such Secretary of War.

That at the dates, respectively, when said bills of exchange were drawn and accepted, and when, according to their tenor and effect, said bills became due and payable, the government of the United States was indebted to said Russell, Majors & Waddell, as government contractors, in a much larger sum of money than the amount specified in said bills of exchange.

That the United States were indebted to the said Russell, Majors & Waddell, as government contractors, in a much larger sum than the said bills of exchange, accepted as aforesaid by the said John B. Floyd specified, and the said bills of exchange represented an actual and bona fide indebtedness on the part of the United States to the said Russell, Majors & Waddell.

That at the time said bills of exchange were drawn on the
said John B. Floyd, Secretary of War, and his acceptance
12 thereof, as aforesaid, a state of hostilities was existing in that
portion of the territory of the United States known as Utah.
That the contract made with said Russell, Majors & Waddell, by the United States, was for the transportation of supplies for the army of the United States in Utah. That at the time said bills were drawn on the said John B. Floyd, Secretary of War, as aforesaid, and accepted by him, as aforesaid, the United States army in Utah was in imminent danger of destruction from cold and starvation. That under these circumstances, it become the duty of the said Secretary of War to make every provision in his power to save the said army from destruction. That the said John B. Floyd, Secretary of War, as aforesaid, in order to save the said army of the United States

in Utah from destruction, authorized said bills of exchange to be drawn by the said Russell, Majors & Waddell, and accepted the same, as he well might do for said purpose, said action on his part being necessary to save said army.

And your petitioners further showeth, that the said John B. Floyd, Secretary of War, aforesaid, had authority, by the law of the land, to make advances to said Russell, Majors & Waddell, on their said contract after their trains were ready to start; and that in pursuance of said authority, the said trains being ready to start, he authorized the said bills of exchange to be drawn by the said Russell, Majors & Waddell, and put his written acceptance upon the same as Secretary of War, as aforesaid.

That the said John B. Floyd, Secretary of War, had authority, under the laws of the United States, to ascertain and determine the indebtedness of the United States to Russell, Majors & Waddell, as government contractors; that in pursuance of this authority he did determine that there was due to the said Russell, Majors & Waddell the sums respectively specified in said bills of exchange, at their respective dates and acceptances, and the said bill of exchange, so drawn and accepted as aforesaid, are conclusive evidence against the United States of such indebtedness.

That the United States, at the times when said bills of exchange were drawn and accepted, were indebted to said Russell, Majors & Waddell to the full amount specified in said bills of exchange; and your petitioner has an equity to be subrogated to the rights of said Russell, Majors & Waddell, and to be paid said bills.

13 And thereupon your petitioners pray that the United States may be adjudged to pay them the amount of the above-described bills, together with their damages and interest thereon.

E. D. MORGAN & CO.
By SOLON HUMPHREYS.
C. CUSHING,
Counsel, Washington.

CITY, COUNTY, AND STATE OF NEW YORK, *ss.*

On this 5th day of June, 1867, before me personally appeared Solon Humphreys, to me known to be the person described in and who subscribed the foregoing amended petition, who, being by me duly sworn, said: That no assignment or transfer of said claim mentioned therein, or any part thereof, or any interest therein, has been made, except as in said petition mentioned; that said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just claims and assets; and that he believes the facts as stated in said amended petition are true.

ELLIOTT F. SHEPARD,
Commissioner United States Court of Claims.

United States Court of Claims.—Dec. term, 1866.

EDWIN D. MORGAN and others
vs.
THE UNITED STATES.
} No. 1898.

It is hereby mutually stipulated and agreed that the above-entitled case shall be submitted to the court, as of this date, on petition, amended petition, evidence, and stipulations as to evidence, with arguments for the petitioners and the United States. All of which shall be delivered to the respective judges of this court on or before the first day of July, 1867.

April 7, 1867.

C. CUSHING,
For Petitioners.
JOHN J. WEED,
Asst. Sol. for the United States.

In the Court of Claims.—Dec. term, 1866.

14 *Traverse.*

EDWIN D. MORGAN and others
vs.
THE UNITED STATES.

And now come the United States by John J. Weed, their solicitor, and say that they are not indebted unto the said Edwin D. Morgan and others in the sum of $20,000, or any part thereof, in manner and form as said Edwin D. Morgan and others have complained.

June 12, 1867.

JOHN J. WEED,
Ass't Sol. for the United States.

In the Court of Claims.—Dec. term, 1866.

Replication.

EDWIN D. MORGAN and others
vs.
THE UNITED STATES.
} No. 1,898.

And now, the said Edwin D. Morgan and others come, and, in reply to the traverse of the United States, filed in the above-entitled proceeding, say the United States are indebted to them in the several sums, with the damages and interest thereon, as the same are in their said petition and amended petition set forth, and that each and every the averments therein contained are true; and this they are ready to prove.

June 12, 1867.

E. D. MORGAN & CO.,
By C. CUSHING,
Their Solicitor and Attorney.

15 United States Court of Claims.

Petition.

BOATMEN'S SAVING INSTITUTION
vs.
THE UNITED STATES.

To the honorable the justices of the Court of Claims of the United States:

Respectfully represents the Boatmen's Savings Institution, a corporation duly established by the laws of the State of Missouri, having its usual place of business at St. Louis, in said State; that they are the holders in good faith, and the owners for a valuable consideration, by them paid, of three several drafts or bills of exchange, made by Russell, Majors & Waddell, at the times severally of the respective dates thereof, upon the Honorable John B. Floyd, who, at the dates of the said several acceptances, and at the times of the acceptance thereof, was Secretary at War of the United States, which said several drafts or bills of exchange were, by the said John B. Floyd, in his official capacity and in behalf of the said United States, duly accepted, the said three bills amounting to the sum of forty-five thousand dollars. And the said claimant represents, that the said bills were, in their belief, duly registered at the War Department or entered upon its books or papers, at or about the time or times at which the same were accepted; that they were presented for payment at the several times when and at the place at which they were severally made payable; that payment thereof was refused. They also represent, that the United States are legally and equitably indebted to them in the full and just amount of the said several acceptances, and are by law and in equity bound to pay the same, together with the damages and interest thereon, at the rate of seven per cent. per annum, upon each and every the said bills from the several maturity thereof. Your petitioners aver that the said bills are as hereinafter set forth and described, with the endorsements and acceptance thereon, as follows, to wit:

16 $25,000. WASHINGTON CITY,
May 25, 1860.

Four months after date, pay to our own order, at the Bank of the Republic, New York, twenty-five thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April last.

RUSSELL, MAJORS & WADDELL.

To Hon. J. B. FLOYD,
Secretary of War.

Endosements.

RUSSELL, MAJORS & WADDDEL.
SAMUEL & ALLEN.

Acceptance.

[No. 13.]

WAR DEPARTMENT,
May 28, 1860.

Accepted.

JOHN B. FLOYD,
Secretary of War.

$10,000.

WASHINGTON CITY,
May 28, 1860.

Four months after date, pay to our own order, at the Bank of the Republic, New York, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April last.

RUSSELL, MAJORS & WADDELL.

To Hon. J. B. FLOYD,
Secretary of War.

Endosements.

RUSSELL, MAJORS & WADDELL.
SAMUEL & ALLEN.

Acceptance.

[No. 17.]

WAR DEPARTMENT,
May 28, 1860.

Accepted.

JOHN B. FLOYD,
Secretary of War.

$10,000.

WASHINGTON CITY,
July 15, 1860.

Six months after date, pay to our own order, at the Bank of the Republic, New York city, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.

RUSSELL, MAJORS & WADDELL.

To Hon. J. B. FLOYD,
Secretary of War.

Endorsements.

RUSSELL, MAJORS & WADDELL.
SAMUEL & ALLEN.

Acceptanee.

[No. 54.]

WAR DEPARTMENT,
July 16, 1860.

Accepted.

JOHN B. FLOYD,
Secretary of War.

The said claimant avers that the said John B. Floyd, as Secretary of the War Department, and in behalf of the United States,
17 and as the principal officer of an executive department, had authority to accept the above-named drafts or bills of exchange, and that in accepting each and every the said bills, he acted in his official capacity, and in behalf of the said United States. And the said claimant avers that the said Floyd, in behalf of the United States, as such Secretary of War, was authorized to accept drafts or bills of exchange of such and the like tenor and effect as the bills aforesaid, and that the said claimant, relying upon the apparent so well as upon the actual authority of the said Secretary of the War Department to make such acceptances, and upon the fact of his acceptance of the said bills, became the holders and owners of the bills of exchange hereinbefore set forth and described. The said claimant also avers that it became such holder and owner, in a regular course of business, of each and every the said bills, before they severally matured. The said claimant also avers that it has been informed that Peirce & Bacon, the holders of similar bills, have petitioned the Congress of the United States for the payment thereof, or for permission under which they could institute legal proceedings thereon against the United States; that so far as they are advised no action has been taken thereon by Congress, except such as may be derived from a recent enlargement of the powers and jurisdiction of the Court of Claims. It also avers, upon information, that the holders of similar bills, without success, have called upon the War Department for the payment thereof; that the said Department has not paid the said three above-described bills, or any part thereof, but has wholly neglected and refused such payment. The said claimant also avers that it have at all times borne true allegiance to the Government of the United States; that it have not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against the said government; that the same is true, so far as the said claimant has any knowledge of the drawers and endorsers of the said bills; and hereupon they pray that the United States may be adjudged to pay it the amount of the above-described bills, together with its damages and interest thereon.

C. B. GOODRICH, *Counsel*.
Address, 30 Court st., Boston, Massachusetts.

BOATMEN'S SAVING INSITUTION,
(Signed) By CHARLES HODGMAN, *Cashier*.
Address of claimant, St. Louis, Missouri.

18 I, Charles Hodgman, of St. Louis, Cashier of the Boatmen's Saving Institution, on oath depose and say: That no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made except as in said petition stated; that said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that I believe the facts as stated in said petition are true.

(Signed) CHARLES HODGMAN.

DISTRICT OF MISSOURI, *July* 1, 1863.

Then personally appeared the above-named Charles Hodgman, and made oath to the truth of the above affidavit by him subscribed, according to the best of his knowledge and belief.

Before me,

[SEAL.] (Signed) CHARLES H. TILSON,
Commissioner of the Court of Claims of the United States.

Amended petition.

And the said Boatmen's Saving Institution, the petitioner in the above-named case, by way of amendment to its original petition in this case, further showeth:

That the bills of exchange set forth in the petition in this case were drawn on the said John B. Floyd, Secretary of War, as aforesaid, for moneys due to the said Russell, Majors & Waddell by the United States, as contractors with the United States, at the dates, respectively, of the said bills of exchange; and the acceptance of said bills made by the said John B. Floyd, Secretary of War of the United States, was made by said John B. Floyd, in pursuance of his duty as such Secretary of War.

That at the dates, respectively, when said bills of exchange were drawn and accepted, and when, according to their tenor and effect, said bills became due and payable, the Government of the United States was indebted to said Russell, Majors & Waddell, as government contractors, in a much larger sum of money than the amount specified in said bills of exchange.

That the United States were indebted to the said Russell, Majors & Waddell, as government contractors, in a much larger sum of money than the said bills of exchange, accepted as aforesaid by the said John B. Floyd specified, and the said bills of exchange represented an actual and bona fide indebtedness on the part of the United States to the said Russell, Majors & Waddell.

19 That at the time said bills of exchange were drawn on the said John B. Floyd, Secretary of War, and his acceptance thereof, as aforesaid, a state of hostilities was existing in that portion of the territory of the United States known as Utah. That the contract made with said Russell, Majors & Waddell by the United States, was for the transportation of supplies for the army of the United States in Utah. That at the time said bills were drawn on the said John B. Floyd, Secretary of War, as aforesaid, and accepted by him, as aforesaid, the United States army in Utah was in imminent danger of destruction from cold and starvation. That under these circumstances it become the duty of the said Secretary of War to make every provision in his power to save the said army from destruction. That the said John B. Floyed, Secretary of War, as aforesaid, in order to save the said army of the United States in Utah from destruction, authorized said bills of exchange to be drawn by the said Russell, Majors & Waddell, and accepted the same, as he well might do for said purpose, said action on his part being necessary to save said army.

And your petitioner further showeth, that the said John B. Floyd, Secretary of War, aforesaid, had authority, by the law of the land, to make advances to said Russell, Majors & Waddell, on their said contract after their trains were ready to start, and that in pursuance of said authority, the said trains being ready to start, he authorized the said bills of exchange to be drawn by the said Russell, Majors & Waddell, and put his written acceptance upon the same as Secretary of War, as aforesaid.

That the said John B. Floyd, Secretary of War, had authority, under the laws of the United States, to ascertain and determine the indebtedness of the United States to Russell, Majors & Waddell as government contractors; that in pursuance of this authority he did determine that there was due to the said Russell, Majors & Waddell the sums respectively specified in said bills of exchange, at their respective dates and acceptances, and the said bills of exchange, so drawn and accepted as aforesaid, are conclusive evidence against the United States of such indebtedness.

That the United States, at the times when said bills of exchange were drawn and accepted, were indebted to said Russell, Majors & Waddell to the full amount specified in said bills of exchange, and your petitioner has an equity to be subrogated to the rights of said Russell, Majors & Waddell, and to be paid said bills.

And thereupon your petitioner prays that the United States
20 may be adjudged to pay your petitioner the amount of the
above-described bills, together with your petitioner's damages
and interest thereon.

BOATMEN'S SAVING INSTITUTION,
By CHARLES HODGMAN, *Cashier.*
C. CUSHING,
Counsel, Washington.

STATE OF MISSOURI, *County of St. Louis, ss:*

Charles Hodgman, Cashier of the Boatmen's Saving Institution, and duly authorized agent, as said cashier of said institution, to act for it in the matters stated in the above petition, being duly sworn, says that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he believes the facts as therein stated to be true.

Affiant, by way of explanation, says that certain securities were held by said institution as collateral security for said acceptances, upon which said collaterals the sum of twelve thousand four hundred and twenty-five and 96-100 dollars has been collected.

C. HODGMAN, *Cashier.*

Sworn and subscribed before me this 12th day of June, A. D. 1867.

AUG. W. ALEXANDER,
Commissioner of Court of Claims for Missouri.

United Stated Court of Claims, Dec. term, 1866.

BOATMEN'S SAVING INSTITUTION
vs.
THE UNITED STATES.
No. 1902.

It is hereby mutually stipulated and agreed that the above-entitled case shall be submitted to the court, as of this date, on petition, amended petition, evidence, and stipulations as to evidence, with arguments for the petitioners and the United States. All of which shall be delivered to the respective judges of this court on or before the 1st day of July, 1867.

April 7, 1867.

C. CUSHING,
For petitioners.
JOHN J. WEED,
Asst. Sol. for the United States.

In the Court of Claims.—Dec. term, 1866.

21 *Traverse.*

BOATMEN'S SAVING INSTITUTION
vs.
THE UNITED STATES.

And now come the United States, by John J. Weed, their solicitor, and say that they are not indebted unto the said Boatman's Saving Institution in the sam of $45,000, or any part thereof, in manner and form as said Boatman's Saving Institution have complained.

JOHN J. WEED,
Asst. Sol. for the Unlted States.

In the Court of Claims.—Dec. term, 1866.

Replication.

BOATMEN'S SAVING INSTITUTION
vs.
THE UNITED STATES.
No. 1,902.

And now the said Boatmen's Saving Institution come, and in reply to the traverse of the United States, filed in the above-entitled proceeding, say the United States are indebted to them in the several sums, with the damages and interest thereon, as the same are in their said petition and amended petition set forth; and that each and every the averments thereon contained are true; and this they are ready to prove.

June 12, 1867.

BOATMEN'S SAVING INSTITUTION,
By C. CUSHING,
Their Solicitor and Attorney.

22 In the Court of Claims.

The Dover Five Cent Savings Bank
vs. No. 1,890.
The United States.

E. D. Morgan and others
vs. No. 1,898.
The United States.

Boatmen's Saving Institution
vs. No. 1,902.
The United States.

And now to wit, December 23d, A. D. 1867, the court upon due consideration of the premises, do order, adjudge, and decree that the several claimants take nothing by their suits, and that their several petitions be dismissed.

23 In the Court of Claims.

Dover Five Cent Saving Bank
vs. No. 1,890.
Thh United States.

E. D. Morgan and others
vs. No. 1,898
The United States.

Boatmen's Saving Institution
vs. No. 1,902.
The United States.

And now come the said petitioners, on the 22d day of January, A. D. 1868, and having heard the judgment of said court in said causes in open court, take an appeal therefrom to the Supreme Court of the United States, and respectfully pray that the said appeal may be allowed by by this court.

By C. CUSHING,
Attorney for Petitioners.

Fled in the clerk's office, Jan'y 22d, 1868.

24 At a Court of Claims held at the Capitol, in the city of Washington, on January, the 22d day, A. D. 1868.

DOVER FIVE CENT SAVINGS BANK
vs.
THE UNITED STATES.
No. 1,890.

E. D. MORGAN and others
vs.
THE UNITED STATES.
No. 1,898.

BOATMEN'S SAVING INSTITUTION
vs.
THE UNITED STATES.
No. 1,902.

In each of the above-named cases, Mr. Cushing, counsel for claimants, presented a petition for the allowance of an appeal to the Supreme Court of the United States, which petitions were filed in the clerk's office of this date.

Whereupon it was ordered by the court, that in each of the above cases, an appeal be allowed.

25 In the United States Court of Claims.

The Floyd Acceptance cases.

DOVER FIVE CENT SAVINGS BANK
vs.
THE UNITED STATES.

E. D. MORGAN, and others
vs.
THE UNITED STATES.

BOATMAN'S SAVINGS INSTITUTION
vs.
THE UNITED STATES.

The court find the facts to be:

1. That the petitioners purchased the said bills in open market before they severally matured.

2. That it is and has been the practice of heads of departments to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or the payment of those serving in distant stations, or for services rendered.

3. That on the 16th day of January, 1858, Russell, Majors 26 & Waddell contracted with the United States for the transportation of army supplies from Forts Leavenworth and Riley, in Kansas and other points on the Missouri river, to any depot or post in the Territory of Nebraska south of latitude forty-four north; in the Territory of Oregon, south of the same latitude, and to the Territory of Utah to its south boundary, agreeably to a schedule of prices

annexed to the contract. The contract provided for payments, from time to time, as the services might be performed, upon certificates of the quartermaster's department, a portion when the trains was started and the balance when the supplies should be delivered at their destination; and the payments were to be made at the rate specified, either at the quartermaster's office at Fort Leavenworth, or by draft on the assistant treasurer at New York as the contractors might elect.

27 4. That on the 3rd of March, 1858, Russell, Majors & Waddell contracted with the United States for the delivery of thirty-four hundred beef cattle, to be delived between the first October 1858, and the first of January 1860, to the principal officer or agent of the subsistence department, with the army of Utah, in lots of not les than two hundred and fifty head at one time, payments to be made by the commissary of subsistence at St. Louis, on presentation of duplicate receipts for any delivery.

5. That on the day of Russell, Majors & Waddell contracted with the United States for the delivey of 763,000 pounds of flour to the same army of Utah, at Great Salt Lake, or at Camp Floyd, payments to be made to the contractors by the commissary of subsistence at St. Louis in checks upon the sub-treasurer of New York, on presentation of duplicate receipts of the officer or agent of the subsistence department at the points of delivery for
28 each partial delivery.

6. That the fourth and last contract was dated the 11th day of April, A. D. 1860. It was for the transportation of quartermaster's stores from Forts Leavenworth and Riley to Fort Union, in the Territory of New Mexico, and for the years 1860 and 1861; the prices to be paid, as is usual in all such contracts, were contained in a tabular statement, or schedule annexed to it. And the contractors were to be paid for such service, and according to the rates contained in the schedule, at the office of the quartermaster's department at Fort Leavenworth, by drafts upon the Assistant Treasurer of the United States at St. Louis, Mo., or at New York city, or in specie, (if equally convenient to the quartermaster's department at Fort Leavenworth) as the said firm might elect.

7. That sometime early in 1858, and during the period covered by these contracts, under arrangement between the contractors
29 and Floyd, the Secretary of War, the contractors drew a large number of bills of exchange upon Floyd, as Secretary of War, which he accepted as such; that these bills of exchange so drawn and accepted amounted in the aggregate to over six million of dollars. All of them have been taken up or returned by Russell, Majors & Waddell, except about eight hundred thousand dollars which are still outstanding, and of which those in suit form a part.

A portion of the acceptances were taken up by the sale and negotiation of Indian trust bonds, abstracted from the office of the Commissioner of Indian Affairs in the Department of the Interior. The United States also proved by clerks in the War Department during the time these acceptances were given, that no regular entry or record was made in the department of these acceptances, as was usual in the ordinary and accustomed official transactions of the department.

30 8. That there were large appropriations for subsistence and transportation for the army in the years in which the said contracts were made, and the said drafts or bills of exchange were drawn and payable.

That the unexpended balances of the appropriation for those purposes on the 1st July, 1859, was $357,696, and on the 1st July, 1860, was $673,044 79-100.

9. That on the 18th day of May, 1861, and when the said drafts or bills of exchange were drawn and accepted, there were due to the said contractors above-specified on their contracts for transportation the sum of $17,488 84, and no more.

10. That the said drafts or bills of exchange were accepted by the
said Floyd for the benefit and accommodation of said Russell, Majors,
& Waddell, and on an agreement between them, and the said Floyd
that the same should be taken up and paid by the said Rus-
31 sell, Majors & Waddell, so that they should not be pre-
sented for payment at the Treasury of the United States.

32 Upon the facts found in this case, upon the original and amended petition, we are of opinion that it is substantially in legal effect as the case of Thomas W. Peirce *vs.* The United States, heretofore adjudged, and for the reasons stated in that case and applied to the same facts found here, we decide that the petition should be dismissed, and judgment entered for the defendants.

33 In the Court of Claims.

DOVER FIVE CENT SAVINGS BANK
vs. } No. 1,890.
THE UNITED STATES.

E. D. MORGAN and others.
vs. } No. 1,898.
THE UNITED STATES.

BOATMEN'S SAVING INSTITUTION.
vs. } No. 1,902.
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled causes, and of the final judgment of the court thereon; of the application of the solicitor for the claimants for the allowance of an appeal as filed in the clerk's office on the 22d day of January, A. D. 1868, and of the order of the court allowing the same; of the special finding of facts by the court, and the conclusions of law on said facts on which the court founds its judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 14th day of February, A. D. 1868.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

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Supreme Court of the United States.

PIERCE vs. UNITED STATES.
E. D. MORGAN & CO. vs. SAME.
DOVER FIVE CENT SAVINGS BANK vs. SAME.
BOATMEN'S SAVINGS INST. vs. SAME.

Brief for Appellants.

J. S. BLACK,
of Counsel.

J. L. Pearson, Printer, corner 9th and D streets.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1868.

PIERCE vs. UNITED STATES.
E. D. MORGAN & CO. vs. SAME.
DOVER FIVE CENT SAVINGS BANK vs. SAME.
BOATMEN'S SAVINGS INST. vs. SAME.

The object of this paper is to present our views of the case in the shortest possible form, referring to the other briefs for authorities, and leaving discussion mainly to the oral argument.

We will take the case of Pierce first, and afterwards point out the differences between it and the other three.

Mr. Pierce's petition sets out that he is the holder of three bills of exchange drawn by Russell, Majors & Waddell on the Secretary of War, and accepted by him in his official capacity on behalf of the United States. The bills are set out verbatim in the petition. It is further averred that Floyd had authority to accept them for the United States, and that they were taken bona fide by the claimant in the regular course of business before they matured. They were not paid at maturity, though presented at the War Department. Congress also declined to order payment of them.

The counsel for the government, knowing that the facts set forth in the petition were true, and seeing no defence which could be made against the claim, unless it could be shown, as matter of law, that the Secretary of War had no authority to give the acceptances, demurred to the bill on that ground. This raised the only real question in the cause, and raised it fairly. But after argument the court refused to decide the law of the case on the facts which both parties admitted to be true, and which were true beyond all doubt. A majority of the judges overruled the demurrer without giving judgment, and ordered the solicitor to answer. Under this pressure the solicitor pleaded *nil delict*, and issue was taken on all the facts.

The court having thus forced a false issue between the parties, the claimant proceeded to prove his allegations. He did this perfectly; and so the cause rested at last where the counsel of the United States desired to put it at first—on the point of Floyd's authority. But the "narrow view" of the demurrer with which the court expressed its dissatisfaction was much more favorable to the United States than the broad one disclosed by the evidence; for the latter showed that the *equities* as well as the *law* were wholly against the government. The solicitor, while setting up a mere technical defence, was unwilling to acknowledge that it was done to defeat justice. He would have concealed the fact that this was simply repudiation of an honest debt. He walked reverently backward and threw a mantle over the shame of the nation. But the judges uncovered the nakedness of the *parens patriæ* and looked without blenching.

We are not authorized to go beyond the finding of the court. But like a demurrer to evidence, special verdict, or case stated by the parties, the finding of the Court of Claims may be discussed and considered according to the following rules:

1. We may refer to such other known facts as this court is bound to take judicial notice of without special proof.

2. We may assume the existence of facts which are *not* stated, if they are fairly deducible from facts which *are* stated.

3. Where the evidence is set forth upon which a fact found by the court is predicated, the fact must be regarded as untrue if the evidence be insufficient to sustain it.

4. All mere conclusions of the court below, whether they be in form conclusions of law or fact, or of fact and law mingled together, must be rejected if they are inconsistent with the logic of the law; and the true conclusions must be substituted by this court in their place.

5. When the finding of the court is entirely silent concerning a fact known to be material, it must be presumed that no legal evidence was offered of such fact by the party upon whom the burden of proving it lay.

6. When it thus appears that the evidence of a material fact was in the exclusive possession of one party or the other, and he did not produce it when he ought, he is chargeable with suppression of the truth, and all presumptions are against him.

7. Where the court has expressly referred to a written document, or the testimony of a witness, the whole document and all that the witness testified on the subject becomes part of the finding.

8. Matters wholly irrelevant to the issue are not to be regarded as part of the finding.

9. If it manifestly appears that the inclination of the court was favorable to one party and adverse to the other, some allowance is to be made for that fact in the construction of the finding, and, at all events, the statement of every fact should be taken most strongly *contra proferentem*.

FACTS.

The facts which we suppose to be relevant to the issue are very few and extremely simple.

John B. Floyd was Secretary of War; Russell, Majors & Waddell were contractors for furnishing and carrying supplies to the army in Utah and New Mexico. There are four contracts, all in writing, which will be found on the record and are referred to by the court. These contracts were in full force and in progress of execution when the bills were accepted, and were never forfeited or rescinded. They had been made under the direction of the War Department. The Secretary of War had the administrative supervision of the contractors' accounts. The money earned by the contractors could be paid to them only upon his requisition. Congress had appropriated the money and placed it at the disposal of the department to pay for these services. The contractors drew the bills on the United States, addressing them to the head of the proper department; Floyd accepted them in his official capacity as Secretary of War, on behalf of the United States, and they were afterwards passed by indorsement and delivery to the claimants, who paid an outside price for them in good faith, not only without notice of anything which could discredit them, but (in the case of Mr. Pierce) after a solemn assurance of the secretary that they were perfectly safe and would be promptly paid at maturity.

There is not a syllable on the record showing or tending to show that there was any collusion between Russell and Floyd to defraud the United States, or that there was any corrupt motive for the acceptance, or that the acceptance was given without consideration, or that the consideration failed by any default of the drawers. The whole transaction appears to have been perfectly honest, at least so far as the War Department was concerned. There is no allegation to the contrary. The acceptances appear to have been given either because the money was then due, or else because the contracts of the drawers were a sufficient collateral security to make the government entirely safe.

Some other facts are clearly established by the refusal of the United States to prove them untrue, and by the consequent silence of the finding. Thus it conclusively appears that Russell, Majors & Waddell did not fail in the performance of their contracts. The contracts were never rescinded or forfeited. No account was stated by either of Floyd's successors, nor was any settlement ever made between the drawers and the United States. No claim was ever asserted against them as debtors of the government, nor no suit ever brought. The bills accepted by Floyd were, of course, charged against the drawers' accounts, as directed in the bills themselves, and there is no possible reason for supposing that their accounts are overdrawn as they now stand. The War Department concealed the state of the accounts with Russell and his partners, refusing to produce the books, records, and papers which would show what charges and what credits are or ought to be on them, and what balance is still due from one party or the other.

When it is recollected that the Court of Claims, at the instance of the United States, declared Pierce not to be a *bona fide* holder, and thus opened the case to every equitable defence, this suppression of the truth becomes doubly significant. It greatly strengthens the presumption, which the law would make without it, that the funds of the drawers were in the hands of the acceptors to pay the bills at maturity.

These are the *material* facts. Some "*circumstances*" are referred to by the Court of Claims, and relied on by that learned tribunal, to nullify the acceptances in the hands of the holders. These we shall notice in their order when we come to speak of

THE DECREE.

The court dismissed the petition, and declared the acceptances to be null and void, "under the circumstances of the case," for divers reasons, which we take the liberty to abridge and simplify by leaving out repetitions and involutions.

1. To accept these particular bills was a violation or evasion of the acts of 1823, 1846, and 1853.

2. No usage to accept bills like these existed in the department, and such usage would be unlawful if it did exist.

3. The claimant had actual notice that the acceptances were illegal, and therefore stood in the shoes of the drawers.

4. No decision of the Supreme Court authorized these acceptances, or made them binding.

I. We ask the attention of the court to the acts of Congress which are said to be violated or evaded by these acceptances. The inquiry is irrelevant to the suit; but it may be worth while to show how untrue is the allegation that there was anything at all unlawful in this transaction.

The act of June 31, 1823, prohibits all *advances of public money* upon contracts, and requires that payments shall not exceed the value of the service rendered or the articles delivered before payments. Was this an advance of public money? Take it to be true that the acceptance was given for money yet to be earned. Then the case is this: The contractor comes to the secretary and tells him that the army in a distant and hostile territory is in danger of suffering for lack of supplies, and he (the contractor) cannot furnish them without more capital than his present means will command. The secretary says, "I can pay you no money out of the public treasury until it is due, according to the very terms of your contract; but your credits are daily accumulating, and in a few months the sum you want will be legally payable. I have no objection to put the future obligation of the United States into a negotiable form, so that if you are willing to pay the discount, you can get somebody else to make the advance, which I cannot make. But I must do this cautiously. I will subject the government to no risk. I will accept your bills only for forty or fifty per cent. of the amount which will be due upon the delivery of the goods which are now actually in transitu." This was the very reverse of an advance of the public money.

The state of the accounts between the drawers and the United States have not been disclosed here. For aught that appears, the money drawn for was due at the date of the acceptance. But in the case of The United States vs. The Bank of the Metropolis, it was settled that the state of the drawer's accounts made no difference in the rights of the holder. The act of 1823 was in full force at the time that case was decided. The Court of Claims ignored the authority of this court, as well as every principle of justice, in holding that the acceptance was made void by the act of 1823.

The act of August 6, 1846, makes it a penal offence to loan public money to, or deposit it in, a bank. The court below, with the utmost gravity, decided that these acceptances were void, because the bills were made *payable to the order of the drawers, at a bank.*

The act of 1853 makes all assignments of a claim and all powers of attorney to receive it void, unless executed in presence of two witnesses, after the claim is allowed and the warrant issued. The judges of this court know what that law was made for. It was intended to remedy a great mischief. Claimants were tempted to parcel their claims out among influential persons—members of Congress and officers of the departments—who often made combinations very dangerous to the public interest. It was only a short time before that the head of one department had pressed a claim through another for twice as much as ought to have been allowed, and then took the half of it under an assignment to himself. Besides, the various assignees and attorneys often disputed with the claimant and among themselves concerning the superiority of their respective rights, and the departments were compelled to determine the controversies at great risk of doing wrong, and often at the expense of much time and labor. The act of 1853 forbade payment to anybody but the *legal* owner of the claim, and left him to settle the equities of his assignees and attorneys as he could. This was coupled with a provision which made it criminal for any officer or member of Congress to become interested in a claim. The law was a wise one, for it both purified and simplified the administration of such business. But would you say that the holder of a negotiable instrument, a bond, a bill of exchange, or a coupon, must get a written assignment, made in the presence of two witnesses, after the warrant is issued, from all the persons through whose hands it may have passed? No; because that would be not only an outrage on the spirit of the law, but an absurd violation of its letter. The holder of negotiable paper *is the legal claimant;* he demands payment by virtue of a contract made directly with himself, and not by any kind of subrogation to the rights of another.

II. The court say there is no evidence of a usage to accept such bills, and it would be unlawful if there was. This court adjudicated the exact contrary. The exact contrary is true as matter of law and fact. The exact contrary was decided by this same Court of Claims in the other cases.

III. The claimant, Pierce, says the court, had actual notice that these bills were illegal before he took them. The facts upon which this ruling is predicated are given in the finding. What the court call a notice—a warning to Pierce—was a conversation with Floyd, in which Floyd told him that he had accepted the bills, that he had authority to do so, that there was consideration for them, that he was perfectly safe in taking them, that the acceptances were for only forty or fifty per cent. of goods already on their way, and they were the best securities extant, for appropriations had been already made to pay them. This solemn assurance that the bills were all right was held to be a notice that they were all wrong and illegal!

And the court held Floyd's naked declaration to be something more than notice to Pierce. They treated it as plenary proof of the facts stated by Floyd, and then decided that the facts made the acceptances void—all which was grossly erroneous.

IV. The court assert that the acceptances were not authorized by the decisions of the Supreme Court. The judges could hardly have intended to say that the decisions were not applicable to the case at bar, or that they were adverse to the right of the secretary to accept the bills of a contractor, since they must have known that the power is recognized in many decisions, and in one at least (15 Pet., 377) it is expressly, directly, and positively affirmed. It is not possible to believe that a case so exactly in point was overlooked; still more incredible is it, that the judges should have thought themselves ingenious enough to make a distinction between the two. If they meant to say that the Supreme Court was not regarded as authority in the Court of Claims, we can only express the hope that a different view will be taken here.

THE AUTHORITY OF THE SECRETARY

To give these acceptances is proved beyond a possible doubt, unless the practice of eighty years, with the sanction of Congress and the express adjudication of this court, is to be disregarded, It is a curious fact, that the Court of Claims in the Pierce case totally deny the authority of a secretary to accept bills of exchange, and accompany that denial with an assertion that the practice does not exist: while in the other case they admit that "*it is and has been the practice* of heads of departments to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or for the payment of those serving at distant stations or for services rendered." This last statement is true. Being true, it shows the existence of the power in a secretary to bind the United States in that way; and we are, of course, prepared to show that the acceptances on which our claim is based fell within the general scope of that power. If this be established the United States cannot deny the *legal* obligation, and the "circumstances" are of no moment in any case unless they amount to an *equitable* defence. In this case there can be no equity superior to that of the claimants, for they are *bona fide* holders for valuable consideration.

THE NOTICE.

It is admitted that Morgan and the two banks bought the paper in good faith. But as to Mr. Pierce, Floyd's assurance to him that the paper was genuine, made in pursuance of legal authority, given for good consideration and a perfectly safe investment, these assurances were notice to Pierce that the exact contrary was true and opened the case to such equities as the United States might be able to prove.—(See the opinion.) It is not very easy to understand all this. There is some strange confusion of ideas about the meaning even of the words law and equity. We suppose the paper to be either valid or void. If valid, there is no escape from it except by payment or else by proof that in conscience and fairness it ought not to be paid. If void, it is a mere nullity and the question of notice is immaterial. But the court thought that the effect of the notice was to let the United States show, not fraud or any really equitable defence, but a technical reason for saying that the bills were void in law "under the circumstances." "If they are not bills of the United States," then, says the court, they are *sub-*

ject to the same equities which might have been set up between the original parties;" that is to say, if the United States never accepted the bills they may resort to equity for relief from a legal obligation which does not exist, and then the court calls it equity to smother the natural justice of the case under a technical objection to the validity of the paper. It required such reasoning as this to make the fraud of the War Department triumphant.

The Equities.

All the facts found by the court show that there was no fraud or collusion between the drawers and Floyd, nothing done and nothing intended except what was right and proper. So far as regards the equities, the defence is utterly naked even to shamelessness. If we have a *legal* right to recover there is not a spark of evidence to impugn the *equity* of our claim.

The Other Cases, No. 249.

The principal difference between these and the Pierce case is that here there is no pretence of notice, the claimants are admitted to be *bona fide* holders. That fact being so, the state of the accounts between the drawers and the United States must of course be immaterial. But the court find in this case what they did *not* find in Pierce's case, that the United States owed Russell only $17,488.84, when the bills were drawn, and precisely the same sum (to a cent) on the 18th of May, 1861, nearly a year afterwards, it being certain that the credits were accumulating upon their accounts during all the intermediate term. But it is not shown how the accounts came to be so evenly balanced. The truth, no doubt, is, that the bills in question were charged as they were accepted. This finding, if it proves anything, proves that the War Department had funds of the drawers enough in their hands to pay all the acceptances and $17,488.84 more. The officers of the War Department have taken special care not to let us or the court see their accounts.

We append some extracts from Judge Baldwin's charge in The United States vs. Reeside, that case not being reported except in a Congressional document.

J. S. BLACK,
Of Counsel.

UNITED STATES *vs.* REESIDE.

Judge Baldwin in his charge to the jury, after quoting from 6th Peters, 729, as follows:

"It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion."—*United States* vs. *Arredondo*, (729)—

Said:

"This is the broad rule by which to measure the official acts of the Postmaster General, done within his granted powers. He is the agent, the trustee of the people, the nation, the United States, acting for their use and benefit—accountable criminally for willful or corrupt misdemeanors, and answerable civilly for the public money which comes to his hands. His agency is not confined to the letter of the law. The known usage of this department, not corrected or repudiated by any law, may be equivalent to a new grant of power by Congress, especially in matters officially communicated to either House, and not *disposed of by resolution or fordidden by law; the acquiescence of the Legislature in a notorious usage having the same effect of a law where former laws are silent on the subject.*

"This is a rule in relation to all the Departments of the Government, and should be more liberally extended to the usages and practices of the Post Office than to any other, on account of the multifarious and almost infinitely complicated transactions, depending on contingencies which cannot be foreseen or provided for by any specific enactments of any law.

"The operations of this department cannot be suspended for an hour without public complaint and inconvenience. Yet contingencies constantly arise which require the most prompt and efficient action without regard to expense in any case, and often without inquiring into his powers, which the *public take for granted are adequate to any emergency, and hold him responsible for their plenary exercise.*

* * * * * * * * * *

"We cannot sanction the doctrine contended for, that we must settle controverted accounts with a view to the public interests. We can recognize no duty to look more to the interests of the United States than any other litigant party before us. *If injustice has been done to the United States by their authorized agent, which can only be repaired by the invasion of a private right, they must seek their remedy against* THEIR OFFICER. If he has incurred any criminal or civil responsibility to them, it is his duty to act for their interest as his guide; but as he is made the sole judge of that, the only question for us is, whether the individual should be made answerable for his errors.

* * * * * * * * * *

"That it was the duty of the Postmaster General to open and carry on an account with each contractor for the transportation of the mail is too clear to be doubted; that such account should contain a full statement of all moneys paid to contractors, in whatever mode the payment was made, for services rendered under contract of every description connected with, or incident to, the conveyance of the mails, is equally clear as a duty, for the performance of which there can be no exemption. It is also clear, that the Postmaster General is bound to keep and to render an account of all the receipts and expenditures in and of the Department, from whatever source derived, and on whatever object expended.

"If he accept the draft of a contractor, *absolutely the United States is bound to pay it to the holder to the same extent and on the same principle which apply to a bill of exchange drawn on, and accepted by, a private person.* So the Supreme Court have settled the law, in 15 Peters, 390, and on their authority we here so declare it at this term. If he accepts a contractor's draft on condition that he performs his contract service, the United States is bound to pay it if the service and condition are performed, the amount of which is an item of debit to the contractor and credit to the Postmaster General, in the account which he must render to the Treasury.

"If he accepts a draft from a contractor, purporting to be an account of transportation, when it is intended to apply the proceeds to the use of the Department, and they were so applied, the United States are equally bound to pay the amount to the person who negotiates or holds it in the course of business, as if the draft was, in fact, what its form purported.

"If loans are negotiated with a bank, or otherwise, for the use of the Department, the proceeds must be carried to the credit of the lender and the debit of the Department, or person to or for whom it is paid; so that, whatever shape the transaction may assume, or to whatever purpose it may relate, it must go into account of debit and credit to the proper parties and under the apppropriate accounts.

"A draft on the Postmaster General is a bill of exchange, as held by the Supreme Court, when accepted. He is the debtor to whom the holder must first look for payment; the drawer is only an endorser when this bill is negotiated by a bank; *the faith and funds of the United States are in pledge for its payment*, and the amount may be charged to the Treasurer of the United States in his account with the bank, as the Supreme Court have decided in relation to the four last drafts charged to the defendant in the printed account of the plaintiff.

"*The debt is contracted by acceptance, though not payable till maturity.* If given for the use of the contractor it is chargeable, and ought to be charged to him before it goes into market; otherwise the books and accounts of the Department will not exhibit the true state of debts contracted or paid. If intended for the use of the Department, and so applied, it should be debtor to the bill and credit by the payment of expenses, but is not chargeable to the drawer."

Supreme Court of the United States.

DECEMBER TERM, 1867.

THOMAS W. PEIRCE, Appellant,
versus
THE UNITED STATES.
No. 131.

Dover Five Cent Savings Bank, Edwin D. Morgan and others, and Boatmen's Savings Institution, Appellants,
versus
THE UNITED STATES.
No. 423.

BRIEF FOR THE UNITED STATES.

JOHN J. WEED,
Assistant Solicitor for the United States.

McGill & Witherow, Printers & Stereotypers, Washington. D.C

Supreme Court of the United States.

DECEMBER TERM, 1867.

THOMAS W. PEIRCE, APPELLANT,
vs.
THE UNITED STATES. } No. 131.

DOVER FIVE CENT SAVINGS BANK, EDWIN D. MORGAN AND OTHERS, AND BOATMENS' SAVINGS INSTITUTION, APPELLANTS,
vs.
THE UNITED STATES. } No. 423.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF CASE.

The appellants in these cases instituted their several suits in the Court of Claims, to recover from the United States the amounts of certain bills of exchange, which were described in their several petitions. The appellant, Thomas W. Peirce, sought to recover the sum of $30,000, and he based his right to recover upon the fact that he was the holder, by purchase, of the following-described drafts or bills of exchange:

"$5,000. WASHINGTON, *November* 28, 1859.

"Ten months after date, for value received, pay to own order, at the Bank of the Republic, New York city, five thousand dollars, and charge to account of our contract for supplies for the army in Utah.

"RUSSELL, MAJORS & WADDELL.

"Hon. JOHN B. FLOYD, *Secretary of War.*"

Endorsement: "Russell, Majors & Waddell."

Acceptance: "WAR DEPARTMENT, *November* 28.
"Accepted.
"E. L. JOHN B. FLOYD, *Secretary of War.*"

"$10,000. WASHINGTON CITY, *May* 8, 1860.
"Six months after date pay to our own order *ten thousand dollars*, for value received, at the Bank of the Republic, New York city, and charge to account of our transportation contract of the 12th of April, 1860.
"RUSSELL, MAJORS & WADDELL.
"Hon. JOHN B. FLOYD, *Secretary of War.*"

Endorsement: "Russell, Majors & Waddell."

Acceptance: "WAR DEPARTMENT, *May*, 1860.
"Accepted.
"No. 8. JOHN B. FLOYD, *Secretary of War.*"

"$15,000. WASHINGTON CITY, *August* 17, 1860.
"*Six months* after date pay to our own order, at the Bank of the Republic, New York, *fifteen thousand dollars*, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.
"RUSSELL, MAJORS & WADDELL.
"Hon. JOHN B. FLOYD, *Secretary of War.*"

Endorsement: "Russell, Majors & Waddell."

Acceptance:
"Accepted.
"JOHN B. FLOYD, *Secretary of War.*
"WAR DEPARTMENT, *August* 22, 1860."

The appellant, the Dover Five Cent Savings Bank, sought to recover the sum of twenty thousand dollars upon certain drafts, which are described in their petition as follows:

"$10,000. WASHINGTON CITY, *July* 10, 1860.
"Six months after date, pay to our own order, at the Bank of the Republic, New York City, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.
"RUSSELL, MAJORS & WADDELL.
"To Hon. J. B. FLOYD, *Secretary of War.*"

Endorsement: "Russell, Majors & Waddell."

No. 47.

Acceptance: "War Department, *July* 16, 1860.
Accepted. "JOHN B. FLOYD, *Secretary of War.*"

"$10,000. Washington City. *July* 16, 1860.
"Seven months after date, pay to our own order, for value received, at the Bank of the Republic, New York City, ten thousand dollars, and charge to account of our transportation contract of the 12th day of April, 1860.
"RUSSELL, MAJORS & WADDELL.
"To Hon. J. B. Floyd, *Secretary of War.*"

The appellants, E. D. Morgan and others, sought to recover the sum of $20,000 upon certain drafts, similar in their character, and which are described in their petition as follows:

"$10,000. Washington City, *August* 16, 1860.
"Five months after date, pay to our own order, at the Bank of the Republic, New York, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.
"RUSSELL, MAJORS & WADDELL.
"Hon. J. B. Floyd, *Secretary of War.*"

Endorsement: "Russell, Majors & Waddell, Jno. Anderson & Co."
No. 61.

Acceptance: "War Department, *August* 22, 1860.
"Accepted. JOHN B. FLOYD, *Secretary of War.*"

"10,000. Washington City, *August* 18, 1860.
"Four months after date, pay to our own order, at the Bank of the Republic, New York, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.
"RUSSELL, MAJORS & WADDELL.
"Hon. J. B. Floyd, *Secretary of War.*"

Endorsement: "Russell, Majors & Waddell."

No. 63.

Acceptance: "War Department, *August* 22, 1860.
Accepted. "JOHN B. FLOYD, *Secretary of War.*"

The appellant, the Boatmen's Savings Institution, sought to recover the sum of forty-five thousand dollars, and have based their right to recover said sum from the United States, in virtue of being the holders, by purchase, of the following-described drafts or bills of exchange:

"25,000. WASHINGTON CITY, *May* 25, 1860.

"Four months after date, pay to our own order, at the Bank of the Republic, New York, twenty-five thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April last.

"RUSSELL, MAJORS & WADDELL.

"To Hon. J. B. FLOYD, *Secretary of War.*"

Endorsements: "Russell, Majors & Waddell; Samuel & Allen."

No. 13.

Acceptance: "WAR DEPARTMENT, *May* 28, 1860.

Accepted. "JOHN B. FLOYD, *Secretary of War.*"

"$10,000. WASHINGTON CITY, *May* 28, 1860.

"Four months after date, pay to our own order, at the Bank of the Republic, New York, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April last.

"RUSSELL, MAJORS & WADDELL.

"To Hon. J. B. FLOYD, *Secretary of War.*"

Endorsements: "Russell, Majors & Waddell; Samuel & Allen."

No. 17.

Acceptance: "WAR DEPARTMENT, *May* 28, 1860.

"Accepted. JOHN B. FLOYD, *Secretary of War.*"

"$10,000. WASHINGTON CITY, *July* 15, 1860.

"Six months after date, pay to our own order, at the Bank of the Republic, New York City, ten thousand dollars, for value received, and charge to account of our transportation contract of the 12th day of April, 1860.

"RUSSELL, MAJORS & WADDELL.

"To Hon. J. B. FLOYD, *Secretary of War.*"

Endorsements: "Russell, Majors & Waddell; Samuel & Allen."

No. 54.

Acceptance: "WAR DEPARTMENT, *July* 16, 1860.
"Accepted. JOHN B. FLOYD, *Secretary of War.*"

Each of the original petitions in these several cases in the Court of Claims, contain the following averments:

"The said claimants aver that the said John B. Floyd, as Secretary of the War Department, and in behalf of the United States, had authority to accept the above-named drafts or bills of exchange, and that in accepting each and every the said bills, he acted in his official capacity and in behalf of the said United States.

"And the said claimants aver that the said Floyd, in behalf of the said United States, as such Secretary of War, was authorized to accept drafts or bills of exchange, of such and the like tenor and effect as the bills aforesaid, and that the said claimants, relying upon the apparent, so well as upon the actual authority of the said Secretary of the War Department to make such acceptances, and upon the fact of his acceptance of the said bills, became the holders and owners of the bills of exchange hereinbefore set forth and described.

"It is also averred that each of said claimants have called upon the War Department for the payment thereof; that the said department has not paid the same or any part thereof; but has wholly neglected and refused such payment."

The appellants, the Dover Five Cent Savings Bank, E. D. Morgan and others, and the Boatmen's Saving Institution, asked and obtained leave from the Court of Claims to file in said court an amendment to their several original petitions. And thereupon said appellants filed in said court amended petitions in their several cases, respectively. The averments in the amended petitions are substantially as follows:

"1st. That the bills of exchange set forth in the petition in this case were drawn on the said John B. Floyd, Secretary of War, as aforesaid, for moneys due to the said Russell, Majors & Waddell, by the United States, as contractors with the United States, at the dates, respectively, of the said bills of exchange, and the acceptances of said bills by the said John

B. Floyd, Secretary of War of the United States, were made by said John B. Floyd, in pursuance of his duty as such Secretary of War.

"2d. That at the dates, respectively, when said bills of exchange were drawn and accepted, and when, according to their tenor and effect, said bills became due and payable, the Government of the United States was indebted to said Russell, Majors & Waddell, as Government contractors, in a much larger sum of money than the amount specified in said bills of exchange.

"That the United States were indebted to the said Russell, Majors & Waddell, as Government contractors, in a much larger sum than the said bills of exchange, accepted as aforesaid by the said John B. Floyd specified, and the said bills of exchange represented an actual and *bona fide* indebtedness on the part of the United States to the said Russell, Majors & Waddell.

"3d. And your petitioner further showeth, that the said John B. Floyd, Secretary of War aforesaid, had authority, by the law of the land, to make advances to said Russell, Majors & Waddell, on their said contract, after their trains were ready to start, and that in pursuance of said authority, the said trains being ready to start, he authorized the said bills of exchange to be drawn by the said Russell, Majors & Waddell, and put his written acceptance upon the same as Secretary of War, as aforesaid.

"4th. That the said John B. Floyd, Secretary of War, had authority, under the laws of the United States, to ascertain and determine the indebtedness of the United States to Russell, Majors & Waddell, as Government contractors; that in pursuance of this authority he did determine that there was due to the said Russell, Majors & Waddell the sums respectively specified in said bills of exchange at their respective dates and acceptances, and the said bills of exchange, so drawn and accepted as aforesaid, are conclusive evidence against the United States of such indebtedness.

"5th. That the United States, at the times when said bills of exchange were drawn and accepted, were indebted to said Russell, Majors & Waddell to the full amount specified in said bills of exchange, and your petitioner has an equity to be subrogated to the rights of said Russell, Majors & Waddell, and to be paid said bills.

"And thereupon they pray that the United States may be adjudged to pay the amount of the above bills, together with damages and interest thereon."

The Court of Claims, upon the hearing of said causes in said court, decided adversely to said several petitioners, and from the judgment of said court these several appellants prosecute their appeal here.

The Court of Claims, in conformity with the rules of this court in regard to appeals from the Court of Claims, have certified, for the consideration of this court, the following findings or statements of fact, upon which statements of facts, together with the petition and pleadings in the Court of Claims, these cases are to be heard here:

In the case of Thomas W. Peirce against the United States the statement of facts certified by the Court of Claims is as follows:

"IN THE CASE OF THO. W. PIERCE
vs.
THE UNITED STATES.

"The Court of Claims certifies the following alterations and modifications of and additions to the specifications of errors alleged by the petitioner, so as fully, fairly, and distinctly to present the points decided by said court.

"That the petitioner claimed to recover from the United States thirty thousand dollars, upon three bills of exchange set forth in the petition, together with interest and damages thereon.

"That the said bills were, at their respective dates, drawn by Russell, Majors & Waddell on Mr. Floyd, as Secretary of War, and were accepted by him, and endorsed by said Russell, Majors & Waddell, as shown thereon; and that the petitioner became the holder and owner thereof by purchase.

"That from 1811 to 1817, and during the administration of Mr. Monroe, it was the practice of the Government, by the Secretary of War and Postmaster General, to accept bills drawn by subordinate officers and contractors, and that such bills were paid. And a like practice obtained from 1818 to 1863, in relation to bills drawn by *pursers* and navy agents on the Secretary of the Navy, and by ministers and consuls abroad on the State Department.

"That the testimony as to the practice stated in the last paragraph was given in the depositions of Richard Smith and George W. Riggs; and the United States, by their solicitor, moved to exclude the same:

"1st. Because the purpose of said testimony was to establish a usage of the executive departments, in order to enlarge the powers of a public agent, whose authority is conferred and limited by law.

"2d. Because the claimant relies exclusively upon the several instruments in writing described in his petition as "express contracts with the Government of the United States," and not upon any usage of any of the executive departments.

"That there were four several contracts, made and executed in writing, between Russell, Majors & Waddell, the drawers of these bills of exchange, and the United States; the first dated the 16th day of January, 1858, for the transportation of army supplies from Forts Leavenworth and Riley, in Kansas, and other points on the Missouri river, to any depot or post in the Territory of Nebraska south of latitude forty-four north; in the Territory of Oregon south of the same latitude, and to the Territory of Utah to its south boundary, agreeable to a schedule of prices annexed to the contract. *The contract made provision for payment from time to time, as the services might be performed, upon certificates of an officer of the quartermaster's department, a portion when a train was started, and the balance when the supplies should be delivered at their destination. They were to be paid at the rate specified, either at the quartermaster's office at Fort Leavenworth, or by draft on the assistant treasurer at New York, or in specie, as they might elect.*

"One dated March 3, 1858, for the delivery of thirty-five hundred beef cattle, to be delivered between the 1st of October, 1858, and the 1st of January, 1860, to the principal officer or agent of the subsistence department with the army of Utah, in lots of not less than two hundred and fifty head at any one time. *Payment to be made by the commissary of subsistence at St Louis, on presentation of duplicate receipts for any delivery.*

"The third contract was for the delivery of 763,000 pounds of flour to the same army at Great Salt Lake, or at Camp Floyd. *Payment was to be made to them by the commissary of subsistence at St. Louis, in checks on the sub-treasurer in New York, on presentation of duplicate receipts of the officer or agent of the subsistence department, at the points of delivery for each partial delivery.*

"The fourth and last contract was dated the eleventh day of April, A. D., 1860. It was for the transportation of quartermasters' stores from Forts Leavenworth and Riley to Fort Union, in the Territory of New Mexico, and for the years 1860 and 1861. *The prices to be paid, as usual in all such contracts, were contained in a tabular statement of schedule annexed to it; and the contractors were to be paid for such service, and according to the rates contained in the schedule at the office* *of the quartermaster's department at Fort Leavenworth, by drafts upon the assistant treasurers of the United States at St. Louis, Missouri, or at New York city, or in specie, (if equally convenient to the quartermaster's department at Fort Leavenworth,) as the said firm might elect.*

"That during the periods covered by the said contracts, and under an arrangement made between the said contractors and said Floyd, they drew upon him a large number of bills of exchange, amounting in the aggregate to over six millions of dollars; that these bills were drawn upon and accepted by Mr. Floyd as Secretary of War, and included those now sued upon; that, for the first several hundred thousand dollars, bills of lading and vouchers were returned to the Quartermaster General, whose assistant gave the contractors checks on the United States Treasury in New York, which were delivered to their agent, who was deputed by the Department to take up these acceptances. But after the first several hundred thousand dollars, the Department allowed the contracttors to draw the money accruing on their existing contracts, and to apply the same to the payment of the outstanding acceptances in their own way; that the acceptances issued in 1858, and most of those issued in 1859, were taken up or retired; that, of the acceptances issued in 1860, about two hundred and ninety-five thousand dollars were, at maturity, taken up and paid by said contractors. Three hundred and forty thousand dollars were returned by them, unused, to the Department; and there remains now outstanding about seventeen hundred and twenty thousand dollars, of which eight hundred and twenty thousand dollars are held by the Department of the Interior, having been placed there in lieu of Indian trust bonds abstracted from the office of the Commissioner of Indian Affairs, and negotiated and used by said contractors in taking up a portion of the acceptances retired; and the residue of said acceptances, amounting to over eight hundred and fifty thousand dollars, including those now sued upon, are now held by various purchasers.

"That the facts stated in the preceding paragraph are found on the deposition of William H. Russell, produced on the part of the defendants; that the petitioner objected to the introduction and reading of the contracts with Russell, Majors & Waddell, and to any evidence showing the state or condition of Russell, Majors & Waddell with the War Department, and to the introduction of any proof tending to show any negotiation, understanding, or agreement which may have been had by and between Russell, Majors & Waddell with the War Department in relation to the acceptances by the Secretary of War, and assigns as a cause of exception, that the bills of exchange set forth in the petition are absolute and unconditional, and cannot be controlled or affected by the contracts, accounts, or negotiations of Russell, Majors & Waddell with the War Department.

"That the petitioner objected to the introduction as evidence of the deposition and statements of William H. Russell, one of the drawers of the bill declared upon, and to the matters therein contained which have been produced in court and offered in evidence by the United States, so far as the same have or may have a tendency to defeat or impair the validity or character of the bills declared upon, to which he has given credit and currency by his name as a party. He also objects that the deposition and statements of William H. Russell are not admissible in proof, because they, and the matters therein contained, are not relevant to the issue, and because there is no proof that they were communicated or known to the petitioner at or before the time he discounted and became the holder of the bills declared upon; that he also insisted upon objections heretofore taken.

"That no regular entry or record of said acceptances was made in the Department, such as was usual and customary in its official transactions.

"That there were large appropriations for subsistence and transportation for the army for those years, and that the unexpended balance of the appropriations for those purposes was, on the first of July, 1859, $357,696, and on the 1st of July, 1860, was $673,044 79.

"It was in evidence that before the petitioner became the purchaser or holder of the acceptances sued upon, he, in a personal interview with Mr. Floyd at Washington, in which the petitioner sought to ascertain the validity of such paper then in the market, inquired of Mr. Floyd, in relation to such acceptances, if such had been issued by his Department? if there was any authority for their issue? if there had been a consideration for them? if they would be paid at maturity? to which questions the said Floyd answered in the affirmative, and further said, in substance, that there was an exigency in the affairs of his Department growing out of the Utah war; that it was a bad season when the war begun, and that, as the contracts were very large, they required a very large outlay; that there were no contractors with the Government who had money sufficient to make the necessary outlay and perform the service as promptly as it should be done; that Russell, Majors & Waddell were large contractors, and had been for years; that they were prompt and reliable, but that their outlay was so large that the Government had to give them some aid; that he, the petitioner, asked of said Floyd, while your Treasury is full of money, why not give them the money? and said Floyd responded that there was an express law against that, but there was authority for securities of this character, and that it had been the custom of the Department to give them in certain contingencies since the organization of the Government; and said Floyd further said, as the petitioner understood, that he, the said Floyd, made no acceptances until the trains were ready to start, when the contractor had nothing to do but to perform his service, having incurred all his expenses. When the trains were ready to start he gave these acceptances for about 50 per cent.—40 or 50 per cent.—upon the amount which would be due when the full service had been performed. And on this evidence it was found by the court that the complainant, before he became the purchaser or holder of said acceptances, had express and explicit notice of the illegal nature and character of the transactions out of which the securities took their rise; and knew that Congress had supplied the Secretary of War with money to pay for all the supplies and transportation the army needed.

"That the evidence stated in the preceding paragraph was given in the deposition of the petitioner, adduced by the defendants, and the petitioner objected to the admission of the examinations of himself, so far as they contain or purport to give the statements of the Hon. John B. Floyd, Secretary of the War Department, in relation to bills which he has given his official signature. And he assigned as grounds of his objection—

"1st. That the said Secretary cannot, by his testimony or statements, defeat, or impair, or discredit negotiable instruments to which he has given his official signature.

"2d. The statements coming from any source of proof are not admissible to vary, defeat, impair, or discredit the bills declared upon, or to control the construction or import thereof.

"3d. Because there is no evidence in the cause for which it can be inferred that the statements had any reference to or connection with the bills declared on.

That at the hearing the claimant asserted that the instruments in suit were to be considered in law as bills of exchange of the United States; that they were accepted by John B. Floyd, acting in his official capacity, in behalf of the United States; that he was an innocent holder for value of these acceptances, and that the United States were therefore liable in law to pay the same.

"That the claimant contended that the Secretary of War had authority to bind the United States by these acceptances.

"First. By virtue of the Constitution of the United States, article 2, section 2, and the act of Congress of August 7, 1789, which provides for the office of Secretary of War and prescribed its duties and powers.

"Second. By virtue of various statutes which relate to the powers and duties of the Secretary of War in regard to contracts for supplies and transportation for the army, and the general management of the affairs of the Department, especially the acts of Congress April 14, 1818, and of May 1, 1820.

"Third. From the usage of the several Departments to accept such bills, and its recognition by Congress.

"Fourth. By virtue of the decisions of the Supreme Court of the United States."

In the other of these cases the Court have certified here the following findings of fact:

"1. That the petitioners purchased the said bills in open market before they severally matured.

"2. That it is and has been the practice of heads of Departments to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or the payment of those serving in distant stations, or for services rendered.

"That on the 16th day of January, 1858, Russel, Majors & Waddell contracted with the United States for the transportation of army supplies from Forts Leavenworth and Riley, in Kansas, and other points on the Missouri river, to any depot or post in the Territory of Nebraska south of latitude forty-four north; in the Territory of Oregon, south of the same latitude, and to the Territory of Utah to its south boundary, agreeably to a schedule of prices annexed to the contract. The contract provided for payments, from time to time, as the services might be performed, upon certificates of the quartermaster's department, a portion when the trains were started, and the balance when the supplies should be delivered at their destination; and the payments were to be made at the rate specified, either at the quartermaster's office at Fort Leavenworth, or by draft on the assistant treasurer at New York, as the contractors might elect.

"4. That on the 3d of March, 1858, Russell, Majors & Waddell contracted with the United States for the delivery of thirty-four hundred beef cattle, to be delivered between the

1st October, 1858, and the 1st of January, 1860, to the principal officer or agent of the subsistence department with the army of Utah, in lots of not less than two hundred and fifty head at one time, payments to be made by the commissary of subsistence at St. Louis, on presentation of duplicate receipts for any delivery.

"5. That on the day of Russell, Majors & Waddell contracted with the United States for the delivery of 763,000 pounds of flour to the same army of Utah, at Great Salt Lake, or at Camp Floyd, payments to be made to the contractors by the commissary of subsistence at St. Louis in checks upon the sub-treasurer of New York, on presentation of duplicate receipts of the officer or agent of the subsistence department at the points of delivery for each partial delivery.

"6. That the fourth and last contract was dated the 11th day of April, A. D. 1860. It was for the transportation of quartermaster's stores from Forts Leavenworth and Riley to Fort Union, in the Territory of New Mexico, and for the years 1860 and 1861. The prices to be paid, as is usual in all such contracts, were contained in a tabular statement or schedule annexed to it, and the contractors were to be paid for such service, and according to the rates contained in the schedule, at the office of the quartermaster's department at Fort Leavenworth, by drafts upon the assistant treasurer of the United States at St. Louis, Missouri, or at New York city, or in specie, (if equally convenient to the quartermaster's department at Fort Leavenworth,) as the said firm might elect.

"That some time early in 1858, and during the period covered by these contracts, under arrangement between the contractors and Floyd, the Secretary of War, the contractors drew a large number of bills of exchange upon Floyd, as Secretary of War, which he accepted as such; that these bills of exchange so drawn and accepted amounted in the aggregate to over six million of dollars. All of them have been taken up or returned by Russell, Majors & Waddell, except about eight hundred thousand dollars, which are still outstanding, and of which those in suit form a part.

"A portion of the acceptances were taken up by the sale and negotiation of Indian trust bonds, abstracted from the office of the Commissioner of Indian Affairs, in the Department of the Interior. The United States also proved by clerks in the War Department, during the time these acceptances were given, that no regular entry or record was made in the Department of these acceptances, as was usual in the ordinary and accustomed official transactions of the Department.

"8. That there were large appropriations for subsistence and transportation for the army in the years in which the said contracts were made, and the said drafts or bills of exchange were drawn and payable.

"That the unexpended balances of the appropriation for those purposes, on the 1st July, 1859, was $357,696, and on the 1st July, 1860, was $673,044 79.

"9. That on the 18th day of May, 1861, and when the said drafts or bills of exchange were drawn and accepted, there were due to the said contractors above specified, on their contracts for transportation, the sum of $17,488 84, and no more.

"10. That the said drafts or bills of exchange were accepted by the said Floyd for the benefit and accommodation of said Russell, Majors & Waddell, and on an agreement between them and the said Floyd that the same should be taken up and paid by the said Russell, Majors & Waddell, so that they should not be presented for payment at the Treasury of the United States.

The Court of Claims, in the first of these cases, that of Peirce against the United States, found the following conclusions of law from the facts which they have certified here:

"1st. That the facts proven did not authorize the Secretary of War to bind the United States by the acceptances upon which that suit was instituted, and that the United States were not therefore liable upon them.

"2d. That the act of January 31, 1823, chapter 9, applied to the head of a Department.

"3d. That negotiable securities, such as were offered in evidence in that case, were within the prohibitions of said act.

"4th. That by virtue of said act the acceptances upon which said suits were instituted were void.

"5th. That the Secretary of War was prohibited by said act, as well as by the act of August 6, 1846, from giving, in his official capacity, in behalf of the United States, the acceptances upon which said suit was instituted.

"6th. That from the facts established upon the hearing of said case, it was evident that said acceptances were issued for the purpose of evading the act of the 31st of January, 1823, as well as the act of the 26th of February, 1853, and were therefore null and void.

"7th. That the evidence adduced in said case failed to establish any usage or practice in the different Departments of the Government, by virtue of which the Secretary of War was authorized to accept, in behalf of the United States, the bills to recover which said suit was instituted, and that if such usage or practice were proven, it could not avail the claimant, because in derogation of the plainest provisions of law.

"8th. That it appeared from the evidence that the claimant had actual notice of the illegal character of the acceptances, and that he was therefore under the same legal disability in respect to his right to maintain his suit upon them as the original payees and endorsers of said bills would have been had the suits been instituted in their names and on their behalf.

"9th. That the authority of the Secretary of War to issue said acceptances was not established by any decisions of the Supreme Court of the United States."

The Court of Claims, in its decision in the last of these cases, adhered to the decision it had pronounced in said case of Peirce against the United States.

II.

Our first inquiry is naturally as to the extent of the powers and the authority of the Secretary of War. We must determine, in the first instance, whether it was competent for him, under the law, to issue the bills of exchange upon which these appellants rely, and in virtue of being the holders of which by purchase they seek to hold the United States liable for their payment. We shall endeavor, therefore, to establish, in the first place, the following proposition:

THAT JOHN B. FLOYD, AS SECRETARY OF WAR, HAD NO AUTHORITY IN HIS OFFICIAL CAPACITY TO ACCEPT THE SEVERAL INSTRUMENTS IN WRITING DESCRIBED IN THE SEVERAL PETITIONS OF THESE APPELLANTS, AND BIND THE UNITED STATES FOR THEIR PAYMENT.

The Secretary of War is a public agent. He can exercise no authority, nor do any act unless the same be authorized by law. The duties which by law the Secretary of War is authorized to discharge are clearly stated in the act for the organization of the Department of War. That act provides—

"That there shall be an executive department, to be denominated the Department of War, and that there shall be a principal officer therein, to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeably to the Constitution, *relative to military commissions, or to the land forces, or warlike stores of the United States, or to such other matters respecting military affairs as the President of the United States shall assign to said Department;* and furthermore, that the said principal officer shall conduct the business of the said Department in such manner as the President of the United States shall, from time to time, order or instruct." (1 Stat. at Large, pp. 49, 50.)

The Secretary of War, under the Constitution, succeeded to the powers and duties imposed upon that officer under the Articles of Confederation. It may be inferred, therefore, that his duties under the Constitution and laws are not dissimilar to those imposed upon him by the act of Congress of January twenty-seventh, 1785. That act is as follows:

"That the powers and duties of the Secretary at War shall be as follows, to wit: To examine into the present state of the War Department, the returns and present state of the troops, ordnance, arms, ammunition, clothing, and supplies of the troops of these States, and report the same to Congress; to keep exact and regular returns of all the forces of these States, and all the military stores, equipments, and supplies in the magazines of the United States, or in other places for their use. And to receive into his care, from the officers in whose possession they may be, all such as are not in actual service; to form estimates of all such stores, equipments, and supplies as may be requisite for the military service, and for keeping up competent magazines, and to report the same to the Commissioners of the Treasury of the United States, that measures may be taken in due time for the procuring of the same. To prepare estimates for paying and recruiting the troops of these United States; to carry into effect all ordinances and resolves of Congress for raising and equipping troops for the service of the United States; and for inspecting the said troops, and to direct the arrangement, destination and operation of such troops as are or may be in service, subject to the orders of Congress, or of the committee of the States in the recess of Congress. To make out, seal, and countersign the commissions of all such military officers as shall be employed in the service of the United States. To take order for the transportation, safe keeping, and distributing the necessary supplies for such troops and garrisons as may be kept up by the United States." (Journals Continental Congress, vol. 10, p. 37.)

In the case of Parker against the United States, (1 Peters, p. 296,) the Court discuss the character of the powers which the Secretary of War, under the law, may rightfully exercise. The suit, in that case, was instituted to recover the commutation value of double rations, which had been issued to an officer of the army under the order of the Secretary of War. The Comptroller of the Treasury refused to allow them in his settlement with the officer, and deducted them from the amount due. The officer instituted suit against the United States for moneys due and received, and judgment was rendered against the officer. This is the language of the Court:

> "The Secretary of War, as the legitimate organ of the President, *under a general authority from him, may exercise the power*, (issue the double rations.) It is not contended, in the case under consideration, that the grant was made by the President; but the plaintiff in error claims it under the orders which have been recited and are spread upon the record."

The orders referred to were the orders of the Secretary of War.

In the case of the United States against McDaniel, (7 Peters, p. 14,) the court, speaking of the powers of the Secretary of War, say that "he is limited in the exercise of his powers by the law."

The same principles are recognized and affirmed in the case of Williams against the United States, (1 Howard, 290,) and Wilcox against Jackson. (13 Peters, 498.)

In the case of Gidley against Lord Palmerston, (3 Brod. and Bing., p. 185,) the court held that Palmerston, being the Secretary of War, was only the agent or officer of the Crown, and responsible to the Crown for the execution of the trust or duty committed to him.

The principle established by these cases and the acts of Congress to which we have referred is this: that the head of any one of the executive Departments of the Government is but the agent of the President, for the purpose of performing the duties and exercising the powers committed by the Constitution and laws to the President. As the powers which the President may exercise are limited by the Constitution and laws, so are the powers which his agents may exercise subject to the same restrictions. To deny this would be to say that the agent was greater than the principal, and subject to no restriction but his own discretion. Such an idea is at war with the whole theory of our Government, and subversive of every safeguard which has been established for preventing the unauthorized exercise of power by persons acting in behalf of the Government.

In the case of Little *et. al. vs.* Barreme *et. al.*, (2 Cranch, p. 170,) the court decided that the orders of the President, unless made within the scope of his lawful authority, afforded no protection to those who execute such orders. The President, therefore, not less than his secretaries, is limited and restricted by the Constitution and the laws made under it. Neither he, nor any of his constitutional advisers, have authority to bind the United States, except in accordance with law.

The duties of the Secretary of War are merely executive. As the agent of the President he is charged with executing the will of Congress in regard to the duties pertaining to the military service of the United States. It is for Congress to provide the means by which the military operations of the Government are to be conducted. It is for Congress to determine the number of troops that shall be raised at any time or for any purpose. It is for Congress to provide for their transportation, their clothing, their equipments, and their subsistence; and the powers of the Secretary of War are limited to the execution of the will of Congress as expressed in legislative enactments in regard to these subjects. Congress declares, by legislative enactments, the manner in which the duties devolving upon the Secretary of War, shall be discharged. It enacts the manner in which the contracts that the Secretary of War is authorized to make in regard to the military service shall be executed. It provides the means for the satisfaction of those contracts when they are made by the Secretary of War. The Secretary of War has no concern with the means which are to be provided for discharging the obligations of the Government for any contracts which he may make in virtue of any law of Congress. It is no part of his duty to provide the means by which the affairs of his Department shall be successfully administered.

The Secretary of War, although a public agent, has conferred upon him a special power and authority. He is the agent of the Government for the purpose of looking after the interests and providing for the wants of its army, and not for other purposes. The Secretary of State. of the Treasury, of the Navy, of the Interior, of the Post Office Department, are all the special agents of the President, for the performance of the duties committed to them by the President under the law. In their respective characters they are similar to general agents appointed for particular purposes, and within the limit of their powers are vested with absolute authority to accomplish the ends and objects of their agency. (Story on Agency, sec. 22.)

The fact that the Secretary of War is vested with discretion in the administration of those matters which the law confides to him cannot enlarge or extend his powers. His discretion extends only to the execution of the laws and regulations of Congress under which he is from time to time required to act. (Decatur against Paulding, 14 Peters, 515; United States against Guthrie, 17 Howard, 303; United States against Eliason, 16 Peters, 302.)

The Secretary of War, although he is the "principal head of a Department," has no authority except such as the law confers. He is not such an agent as is created by private letters and instruction of which the public can have no knowledge; his authority is only such as the law permits him to exercise, and of the extent of that authority no one can rightfully plead ignorance. It was well said by Hon. B. F. Butler, when Attorney General of the United States, speaking of the powers of the Postmaster General:

"The Postmaster General is merely the agent of the Government, and has but a limited authority; it is only such acts as are within the scope of that authority, and conformable to law, that are obligatory on his principals." (Opinions of Attorneys General, vol. 4, p. 135.)

In the argument of this case it will be contended that both upon principle and by statute the following propositions are established:

First. That the officers of the Government of the United States are merely agents, appointed by law to do certain acts and perform certain duties required by law, and that they have no powers beyond those specified in the law which creates their office and defines their powers and duties.

Second. That the Secretary of War is merely an officer appointed to superintend the equipment, subsistence, transportation, and other necessary supplies for the armies of the United States and the War Department; he has no power, by any law or regulation, to bind the Government by the acceptance of bills of exchange in his official capacity.

Third. That no quartermaster or other officer of the War Department can create any liability against the United States except for articles, transportation, or supplies actually furnished to or used by the army of the United States.

Fourth. That the Secretary of War can make no contract respecting the furnishing of supplies for his Department, unless there be some law authorizing the same, or an appropriation adequate to its fulfillment.

Fifth. That the power of the Secretary of War, in respect to contracts that he may make in regard to the furnishing of supplies for his Department, is exhausted when the contract which the law authorizes him to make has been made by him as the agent of the United States.

Sixth. That it is not within the scope of the powers conferred by law upon the Secretary of War to provide the means by which the obligations of the Government under contracts which he may make shall be discharged.

NEITHER THE STATUTES NOR THE AUTHORITIES UPON WHICH THE APPELLANTS RELY SUSTAIN OR ESTABLISH THE AUTHORITY OF THE SECRETARY OF WAR TO MAKE CONTRACTS ON BEHALF OF

THE GOVERNMENT OF THE UNITED STATES, BY THE ACCEPTANCE OF DRAFTS OR BILLS OF EXCHANGE DRAWN UPON HIM IN HIS OFFICIAL CHARACTER.

The first statute upon which the appellant relies is the act for the establishment of the War Department, to which we have already referred. He seeks to establish the authority of the Secretary of War to accept bills of exchange from that clause in said act which provides "that the said principal officer shall conduct the business of the said Department in such manner as the President of the United States shall from time to time order or instruct."

The next statute cited in support of this authority is the act of May 8, 1792, (1 Stats. at Large, p. 279,) the fifth section of which provided "that all purchases and contracts for supplying the army with provisions, clothing, and supplies in the quartermasters' department, military stores, Indian goods, and all other supplies or articles for the use of the Department of War, be made by or under the direction of the Treasury Department."

The next act to which reference is made is the act of 1798, (1 Stats. at Large, 610, sec. 3,) which directs that "all purchases and contracts for supplies and services for the military service of the United States shall be made by or under the direction of the chief officer of the Department of War."

The appellant, in further support of this authority, refers to the act of 1809, (2 Stats. at Large, 535, 536, sec. 5,) which provides "that all purchases and contracts for supplies or services which are or may be according to law, be made by or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made upon open purchase, or by previously advertising for proposals respecting the same."

The counsel for the appellant also quotes an act passed in 1813, entitled, "An act the better to provide for the supplies of the army," &c. (2 Stats. at Large, 816–17, sec. 8.) That portion of said act which is quoted to sustain the argument of appellant is as follows: "That in all cases where, from any want of contractors, or from any deficiency on their part, or from any other contingency, such measure may be proper and necessary, in order to insure the subsistence of the army, or any part thereof, the President of the United States is empowered, as he may deem it expedient, either to appoint, for the time being, a special commissary or commissaries, for the purpose of supplying by purchase or contract, and of issuing, or to authorize any officer or officers in the Quartermaster General's department, to supply and issue the whole or any part of the subsistence of the army."

This act cannot be construed to enlarge the powers of the Secretary of War in regard to the making of contracts; it provides that the President, in the happening of a certain contingency, might appoint special commissaries for meeting the exigencies of the military service of the United States; it provided nothing more than this. Even if this act were an authority to sustain the position of the counsel for the appellant, it is very clear that the exigency contemplated by that statute did not exist here.

The next act to which we are referred was passed in 1818, (3 Statutes at Large, 426–7, sec. 7,) by which it was provided "that supplies for the army, unless in particular and urgent cases the Secretary of War should otherwise direct, shall be purchased by contract, to be made by the Commissary General on public notice, which contract shall be made under such regulations as the Secretary of War shall direct."

The next statute to which reference is made is an act entitled "An act in addition to the several acts for the establishment of the Treasury, War, and Navy Departments," passed May 1, 1820, (3 Statutes at Large, 567–8, sec. 6.) That act provides that no contract shall hereafter be made by the Secretary of State, or of the Treasury, or the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment, and except, also, contracts for the subsistence and clothing of the army or navy, and contracts by the quartermaster's department, which may be made by the Secretaries in these Departments.

We are next referred to a statute passed in 1858, (11 Statutes at Large, 266, sec. 4,) which makes it the duty of the Secretaries of War and of the Navy to report to Congress severally such contracts as they might make under section 6 of the law of 1820.

The principle to be extracted from these statutes is:

First. That the Secretary of War is charged with a general duty, and vested with general authority, (subject to the orders of the President,) in regard to the management of the affairs of the Department of War.

Second. That contracts which may be required to be made for the purpose of making provision for the necessities of the War Department shall be made under such regulations as the Secretary of War shall direct.

Third. That the Secretary of War is limited in his power to make contracts to the existence of a law authorizing the same, or an appropriation adequate to their fulfillment.

Fourth. That the Secretary of War shall report to Congress annually such contracts as he may make in respect to the War Department.

It is very clear that the power of the Secretary of War in respect to contracts relating to his Department is exhausted when he has caused the contracts to be made in conformity with law. The law arms him with power to enforce any contract he may make for the furnishing of supplies to his Department. He may make provisions in his contract for their prompt and entire fulfillment. He may require bonds from the persons with whom he may enter into contracts for the faithful performance of their obligations. All these are incident to the powers and duties devolved upon him under the law. He has no power, in virtue of any of these statutes, to provide the means by which the obligations of the Government to its contractors shall be discharged. He may issue no bonds by which the credit of the United States shall be pledged. He may borrow no money on the credit of the United States for the purpose of meeting the liabilities of his Department, because by the Constitution the power to do these things is expressly reserved to Congress.

A brief examination of the authorities upon which the counsel for the appellant relies to support the proposition that the Secretary of War has authority to issue bills of exchange without any consideration therefor will show that they rather deny than sustain that alleged authority. The authorities upon which the appellant relies as establishing the practice upon the part of the Government to use bills of exchange, from which it is insisted that their use has been judicially sanctioned, are as follows: In the case of Duggan *vs.* United States, the suit was instituted by the United States against the executors of one Clark, who was the first endorser and drawer of a bill of exchange, purchased by an agent of the Government, and with its money. The jury found the agent had acted under and by virtue of competent authority, and the only question urged was as to whether the United States could bring suit on the bill in its own name. The court decided that the suit was properly brought. Although the bill was endorsed to the Treasurer of the United States, yet he being merely the *agent* of the Government, had not such an interest in the bill as enabled him to bring suit in his own name.

In the case of the United States against Bradley, (10 Peters, 359,) the suit was brought upon an official bond, which was not in the language of the statute. It was objected on the trial that the bond was not valid for this reason; the court, however, sustained the validity of the bond, and referred to the case of the United States against Tingrey (5 Peters, 127, 8) as an authority for that case.

In the last case the suit was instituted upon the bond of a purser in the navy, voluntarily given, but not in strict compliance with the statute. The court held that, although the bond was not prescribed by law, yet it having been voluntarily given, was binding upon the parties. They also decide that the United States, being a body politic, "*may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper Department to which those powers are confided, make contracts not prohibited by law and appropriate to the just exercise of those powers.*" Two conditions are requisite to enable the United States to enter into a contract: it must be within the sphere of the constitutional powers confided to it, and it must be appropriate to the just exercise of those powers. We submit that the illegal and unauthorized acceptance of "bills of exchange," by which it is attempted to render the United States liable to pay large sums of money without receiving any consideration therefor, is neither in the contemplation of the Constitution or law the most "appropriate exercise" of the duties committed to the Secretary of War.

In the case of Bruce *vs.* The United States, (17 Howard, 441,) this suit was brought upon the official bond of Bruce, who was an Indian agent, and it was alleged there was a balance due from Bruce to the United States, which he refused to turn over or pay to the United States when required to do so. This case does not, in the slightest degree, recognize or countenance the acceptance of bills of exchange by the Secretary of War.

In the case of United States against Jones, (8 Peters, 375,) the suit was instituted upon the official bond of a contractor, who had undertaken to furnish rations to the troops of the United States in the Mississippi Territory and other places mentioned in said bond. The United States averred that he had not performed his contract, and that he had been overpaid on account thereof. It was objected in that case that the Treasury transcript, upon which the United States relied to maintain their action against the contractor, was not sufficient for that purpose. The objection was sustained and the evidence excluded. The United States appealed to the Supreme Court, where the decision of the court below was affirmed, and in their opinion the court say: "The law has prescribed a mode by which Treasury accounts shall be made evidence, and whilst an individual may claim the benefit of this rule, the Government can set up no exemption from its operation. In the performance of their official duty the Treasury officers act under the authority of law; their acts are public and affect the rights of individuals as well as those of the Government. So far as they act within the rules prescribed for the exercise of their powers, their decisions are in effect final."

In the case of the United States against Buchanan, (8 Howard, 83,) the suit was instituted against Buchanan, who was purser in the navy, upon his official bond to recover a balance alleged to be due by him. Buchanan pleaded a set-off, under the act March 3, 1797. In that set-off he included commissions for drawing bills of exchange, with which he had obtained money from the Navy Department. The court held that he was not entitled to those commissions. This was the only point decided in this case. The appellant relies mainly upon the case of The United States *against* The Bank of the Metropolis, (15 Peters, 377.) They insist that the whole question of the authority of the Secretary of War to accept bills of exchange is, by this decision, *res adjudicate*, and that we may not, therefore, call it in question.

The suit out of which this decision came was brought by the United States against the bank, to recover a balance claimed from it as a depository of public moneys, to show payment to the United States. The bank offered in evidence certain drafts on the Post Office Department, accepted by the Postmaster General and held by the bank against the Government at the time of the institution of this suit. The power of the Postmaster General to accept these drafts was not called in question in the case.

Had such question been urged, the act organizing the Post Office Department and defining the duties of the Postmaster General would have been a conclusive answer. That act, passed March 3, 1825, (4 Statutes at Large, p. 102,) provides:

> "The Postmaster General shall obtain from the postmasters their vouchers for their receipts and expenditures once in three months, or oftener, with the balance thereon arising in favor of the General Post Office. HE SHALL PAY ALL EXPENSES WHICH MAY ARISE IN CONDUCTING THE POST OFFICE AND IN THE CONVEYANCE OF THE MAIL, AND ALL OTHER NECESSARY EXPENSES ARISING ON THE COLLECTION OF THE REVENUE AND MANAGEMENT OF THE GENERAL POST OFFICE."

The drafts drawn in this case (and endorsed to the bank) were accepted by the Postmaster General to pay the expenses specified in the above act. He was the officer who, under the law, was charged with this duty; it was, therefore, but the exercise of a power specifically given him. The act defining the duties of the Secretary of War confers no such power; he is expressly prohibited from making contracts, "except under a law authorizing the same, or an appropriation adequate to their fulfillment."

Again, the Court merely decide in this case that the bank, having parted with its money on the faith of those acceptances, the amount of those drafts would be allowed as an offset to the claim of the Government against the bank. They may, consistently with the facts of the case and the reported decision, have allowed them as *equitable*, rather than legal offsets. During the same term that this decision was made, the Court decided (Gratiot *vs.* the United States, 15 Pet., p. 370) "that *equitable* as well as *legal* claims constitute good grounds of set-off or deduction." If allowed as equitable offsets, they come far short of establishing an original right of action.

The Supreme Court in that case held "that when the United States, by its authorized officer, became a party to negotiable paper they have all the rights and incur all the responsibilities of individuals who are parties to such instruments, and that the want of consideration between the drawer and acceptor cannot be any defense against the rights of the endorsee, who gave a valuable consideration for the bill; it does not matter how the drawer's accounts stood, whether a debtor or creditor of the Department, whether the bank knew one or the other; an unconditional acceptance was tendered to it for discount; it was not its duty to inquire how the account stood or for what purpose the acceptance was made, *all it had to look to was the genuineness of the acceptance and the authority of the officer to give it.* The rule is that the want of consideration between the drawer and acceptor is no defense against the right of the third party who has given a consideration for the bill, and this even though the acceptor has been defrauded by the drawer, if that be not known to such third party before he gave value for it.

The difference between the case under consideration and the case upon which the appellants rely, and from which the above extract is taken, may be stated as follows:

That prior to the passage of the act of July 2, 1836, the Postmaster General was not the head of an executive Department. Prior to the passage of this act, the Post Office Department was not really one of the executive Departments of the Government. *It* was a separate and distinct establishment, constituted and organized by Congress, under that clause in the Constitution giving them power to establish post offices and post roads. The Postmaster General, it is true, was appointed and removable by the President, but that was in virtue of the Constitution giving the appointing power to him in all cases where no other mode is provided. He was not subject to the direction and control of the President; he was not the agent or means of the President in performing executive functions and duties, but the organ of the Congress in carrying into effect the post-office and post-road system of the nation. The powers he exercised and duties he performed were conferred and devolved by Congress. In the organization of that Department they invested this officer with very large powers. He had power to appoint his own assistants, deputies, and clerks. He appointed and removed at pleasure all the postmasters of the country. He established post offices, and provided for and superintended the transportation of the mails. The accounts of his Department were audited and adjusted by him, he filing his own accounts of the general receipts and expenditures every quarter. The funds of the Department were kept separate from those of the Government, and were under the exclusive control of himself, and subject alone to his draft. The moneys were disbursed by him without any appropriation made by Congress. The drafts upon which the bank in that case relied were all issued and accepted while the Postmaster General might rightfully exercise and use the extended powers which the law organizing the Post Office Department conferred upon him. By the Act of July 2, 1836, (5 Statutes at Large, p. 80,) the organization of the Post Office Department was changed. From that time it became one of the executive Departments of the Government. An auditor, for the settlement of the accounts of the Post Office Department, was appointed, who is called the Auditor of the Treasury for the Post Office Department. The moneys, which had, previous to that time, been under the exclusive control of the Postmaster General, and subject to his draft, were required to be paid into the Treasury. This decision cannot, therefore, be considered as a recognition of the authority now claimed for the Secretary of War. There is another difference between that case and the case under consideration. The Post Office Department had had dealings with this bank for years; the bank had been the depository of the funds of the Post Office Department; it was the custom of the Department to make the drafts drawn in favor of the contractors of the Post Office Department payable at the Bank of the Metropolis. There the bills of exchange were given in renewal of others of the Department overdue, and which had been discounted for the accommodation of the Department; here the bills were made payable at a bank where the Government had no funds, and were it would have been felony, by the express provision of the statute, to have placed them; and they were not made for the accommodation of the Government, but for the private accommodation of the contractors, in whose favor they were issued. In that case the necessities of the public service in the Post Office Department justified the issuance of the acceptances; here it is established by the record and found by the court that there was no lack of money or of appropriations for every needed supply of the War Department. In that case, there was no evidence impeaching the honesty of the transaction; the drafts were given to forward and promote the public service; here they were issued for the private benefit of the contractors. In that case the money raised was for, and was applied by the Government of the United States in the payment of their debts; here it was for the benefit of the drawers, and the Government received no value or consideration for them. In that case the United States resisted the payment of the drafts, upon the ground of failure of consideration; here the drafts are defended for the want of authority in Floyd to accept them and of fraud in their inception.

It is submitted, therefore, that this case, upon which the appellants so much rely, cannot be held as an authority for the unauthorized and fraudulent issuance of bills of exchange by the Secretary of War. The principle which may be extracted from the decisions which the counsel for the appellants have cited upon the question of the authority of the Secretary of War to make contracts by bills of exchange may be stated as follows:

First. That the decision of a matter committed by authority of law to any of the executive Departments of the Government is conclusive, so far as it involves the right of any executive head to exercise discretion and judgment.

Second. That a *writ of mandamus* will not lie to compel an executive officer to discharge a duty involving his right to exercise discretion.

Third. The United States, being a body politic, may, through the instrumentality of its authorized agents, make such contracts as may be necessary, in the performance of duties committed by law to the executive Departments.

Fourth. The powers of agents of the Government are determined by law, and their right to exercise discretion is *limited to matters committed to them by law.*

Fifth. The duties committed by law to the President may be executed, *under his authority*, by heads of Departments as his agents.

Sixth. The clear intendment of the law is to prohibit the Secretary of War making contracts by bills of exchange, by which the Government shall be bound.

Seventh. Bonds executed by agents of the Government for the faithful performance of their duties, although not such as prescribed by statute, may be enforced if the voluntary obligations and contracts of the persons executing them.

Eighth. That in any and all cases where the authority of the head of an executive Department to accept bills of exchange has been recognized, there has been some special circumstance existing or duty enjoined by which such exercise of power might be justified.

THE AUTHORITY OF THE SECRETARY OF WAR TO ACCEPT BILLS OF EXCHANGE IS NOT ESTABLISHED FROM THE PROOF OF ANY USAGE OF EITHER OF THE EXECUTIVE DEPARTMENTS OF THE

GOVERNMENT TO MAKE USE OF BILLS OF EXCHANGE IN THE TRANSACTION OF THE ORDINARY BUSINESS IN THEIR SEVERAL DEPARTMENTS.

The facts from which it is insisted that such a usage results, are:

That bills of exchange have been used in the transaction of the business of the War, State, Navy, and Treasury Departments; but in each case in which such use has been established there has been some consideration for the bill. There are no facts which would establish the *usage* of any officer of the Government to become a mere accommodation acceptor. There can exist no usage in any of the executive Departments which will set at defiance constitutions and statutes by which the heads of these Departments are limited and controlled. The usage upon which much reliance is placed by the appellant in this case cannot be maintained, because if it were it would be in contravention of law. The powers of the Secretary of War are to be determined by statute rather than by custom or usage. We may resort to custom to determine the manner in which these powers shall be exercised or duties performed, but not for the purpose of ascertaining the extent or source of the authority itself. Usage can neither extend nor limit the powers which the law confers.

(Strong *vs.* Bliss, 6 Met., 895; Frish *vs.* Baker, 2 John., 334; Dunham *vs.* Day, 13 John., 44; New York Fire Ins. Co. *vs.* Ely, 2 Cowen, 707; Brown *vs.* Jackson, 2 Wash. C. C., 25.)

In Money *vs.* Leach, (3 Burr, 1767,) *the Court of* King's Bench say, "No degree of antiquity can give sanction to a usage bad in itself."

In Donnell *et al. vs.* Columbian Insurance Company (2 Sumner, 377,) Judge Story uses this language, that "usages among merchants should be very sparingly adopted as rules of law by courts of justice."

The allegations of the several petitions of these appellants upon this question of authority are as follows:

> "The said claimants aver that the said John B. Floyd, as Secretary of the War Department, and in behalf of the United States, had authority to accept the above-named drafts or bills

of exchange, and that in accepting each and every the said bills, he acted in his official capacity, and in behalf of the said United States.

"And the said claimants aver that the said Floyd, in behalf of the said United States, as such Secretary of War, was authorized to accept drafts or bills of exchange, of such and the like tenor and effect as the bills aforesaid, and that the said claimants, relying upon the apparent so well as upon the actual authority of the said Secretary of the War Department to make such acceptances, and upon the fact of his acceptance of the said bills. became the holders and owners of the bills of exchange hereinbefore set forth and described."

We cannot better close the discussion of this question of authority than by quoting here the language of Judge Loring, in his concurring opinion, delivered in these cases in the Court of Claims. He says:

"I think the petitioner has not established the case he alleges. He sues the United States on bills of exchange accepted by procuration, and he is to prove the procuration; and this is to be done according to the rules of the common law, for procuration or agency as to a bill of exchange is to be proved in the same way as procuration or agency as to a bond, or any contract not negotiable. And until the procuration or agency is proved, the defendants are not shown to be parties to the bills in suit, and are in no way subjected by them to the law merchant or its rules.

"By the law of agency, at the common law, there is this difference between individuals and the Government: The former are liable to the extent of the power they have apparently given to their agents, while the Government is liable only to the extent of the power it has actually given to its officers. The rule, as to individuals, is founded on the equities of the parties. The rule, as to the Government, is founded on public policy, which overrides the equities of parties; and hence the rule, so constantly used in this court, that the Government is not liable for the unlawful acts of its officers, which necessarily means that such officers are not agents of the Government for unlawful acts or frauds against itself.

"As the United States acts only by its officers, in suits here the procuration has always to be proved, and it is always held to be disproved by proof that the act of the officer was unlawful, or even unauthorized, and the consequence is that no one, however innocent, can recover here upon that which was a fraud against the United States.

"I think the facts stated show that Mr. Floyd's acceptance of the bills in suit was an unlawful act, in fraud of the United States, and that by the rule in the law of agency pertaining to the Government, he was not, in making the acceptances, the agent of the United States, and that they are not bound by them."

III.

THE INSTRUMENTS DESCRIBED IN THE SEVERAL PETITIONS OF THE APPELLANTS IN THE COURT OF CLAIMS, AND UPON WHICH THEY THERE RELIED TO RECOVER JUDGMENT AGAINST THE UNITED STATES, ARE NOT BILLS OF EXCHANGE, AND THE LAW MERCHANT HAS NO APPLICATION TO THEM. THEY ARE NOT ASSIGNABLE. NOR DOES THE FACT OF THEIR ASSIGNMENT CONFER UPON THE APPELLANTS THE RIGHT TO MAINTAIN AN ACTION UPON THEM IN THEIR OWN NAME.

The character of a bill of exchange is well defined by Story. After stating that bills payable at the happening of a particular event only, or upon an event which is contingent, are not, in contemplation of law, bills of exchange, he announces the following as a general rule applicable to these instruments. He says: "A bill of exchange implies a personal credit not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of its negotiation." (Story on Bills, sec. 46.) Again, he says: "The drawing of a bill of exchange implies, on the part of the drawer, an undertaking to the payee, and to every other person to whom the bill may be afterwards transferred, that the drawer is a person capable of making himself responsible for the due payment thereof." (Story on Bills, sec. 121.)

Kent says "that the payment of a bill must not rest on any contingency except the failure of the general personal credit of the person drawing or negotiating the instrument." (3 Kent's Commentaries, 76.)

These propositions, which define the character of a bill of exchange, very clearly indicate that it was not competent for the Secretary of War, in virtue of his official character, to give them that certainty of payment which the law merchant declares to be essential to the existence of a valid bill of exchange. The Secretary of War could not pledge the credit of the United States, or bind it to the unconditional payment of these instruments.

It is submitted, on behalf of the United States, that the following propositions correctly state the law that must be applied to the instruments upon which the appellants relied in the court below:

First. That they are merely orders drawn upon the Secretary of War for specific sums of money, out of funds the drawers expected to be entitled to receive upon contracts to be performed by them.

Second. That every order for money drawn upon the Government is drawn upon a particular fund; and the fund out of which any money may be paid from the Treasury has no existence until created by an appropriation made for that purpose by an act of Congress.

Third. That these instruments being subject in their payment to the contingency of an appropriation, and the existence of a particular fund, are not bills of exchange, subject to the law merchant.

Fourth. That the appellants are chargeable with a knowledge of the existence of these contingencies, because their existence is a matter of law.

The Constitution provides, (art. 1, sec. 9, 6th clause:) "No money shall be drawn from the Treasury but in consequence of appropriations made by law." The act of Congress of August 26, 1842, (5 Statutes at Large, p. 537, sec. 2,) declares "that all acts of Congress making appropriations for the support of the Government shall declare the specific object and purpose of such appropriations." The act of March 3, 1809, (2 Stats. at Large, p. 535, sec. 1,) provides that all warrants for money drawn upon the Treasurer of the United States shall specify the particular appropriation, to which the same shall be charged. The several acts of Congress, and those passed and in force during the years in which these instruments were drawn, specified the particular objects and parposes for which each appropriation was made. Thus, in 1859, the appropriations for the use of the army were distributed as follows, to wit: "For clothing, $1,062,702 99; quartermaster's department, $1,745,000; subsistence, $1,880,652 65; transportation, $3,400,000." The year succeeding that, similar appropriations, specifying the same distinct purposes, were made. The act of Congress of August 31, 1852, (10 Stats. at Large, p. 107, sec. 2,) prohibits the transfer of an appropriation made for one purpose to another fund created for a different purpose.

The foregoing statutes establish the principle that every appropriation made by Congress becomes a distinct fund, which cannot be diverted from the purpose for which it was created; and every debt created by an agent of the Government is payable out of a specified sum, and not otherwise.

The instruments held by these appellants are, upon their face, drawn upon a particular fund.

They specify two sources from which the drawee might pay them: first, from the fund created by the appropriation for transportation; and, second, from that created by the appropriation for supplies for the army. They were not, and could not be, payable unless there were appropriations for those objects.

The following authorities sustain the proposition for which we are contending here: In Carlos *vs.* Fancourt, (5 Term Reports, 482,) Lord Kenyon used this significant language in regard to bills of exchange: "Unless they carry their own validity on the face of them, they are not negotiable."

In Reeside *vs.* Knox, (2 Wharton, 233,) it was decided that every bill drawn on the Government was drawn upon a particular party. In that case Gibson, Chief Justice, used the following language: "Now an indispensable element in the constitution of these instruments, (speaking of bills of exchange,) is an absolute and entire freedom from contingency of payment, dependent upon the happening of an event or the solvency of a fund." But, in contemplation of law, is not every bill drawn on Government drawn on a fund, whether it be so expressed or not? It is a matter of public notoriety that Government accepts for no more, and is bound for no more, whatever be the form of acceptance, than it has in its hands; and that it treats a bill drawn on it as no more than an assignment or order of transfer. In the present instance, the condition expressed in the Treasurer's acceptance indicated no more than the law would have implied without it. The officer being a public agent, would not have been liable on an absolute acceptance, and the Government itself would not have been liable, for it gave him no authority to bind it. Public officers may, doubtless, draw or receive bills to facilitate the business of the Departments, but they would transcend their powers did they dare to pledge the resources of the Government, as a merchant or banker, in the money market. Though it may, doubtless, draw bills for its convenience, it has not a dollar in exchange, nor does it incur collateral responsibilities for its creditors. The ordinary drawee accepts sometimes without funds, but the Government never.

Now, in the composition of a bill of exchange, there must be a drawer and a drawee, and a payee capable, on the face of the bill, of contracting personally, for these instruments are based on personal credit, and not on the credit of a fund. In the case of the Government, which never enters into transactions as an individual, the payee is bound to take notice of its course. The event on which payment is to depend is one of *public notoriety*, which has frequently been held an extrinsic cause of certainty, sufficient to remove an intrinsic uncertainty from the face of the bill, and which must be equally powerful to introduce one. He who takes a bill on a public Department expects it to be paid no otherwise than out of the funds of the drawer.

The public agent is never liable on his acceptance, and the Government itself enters into no contract of suretyship.

In the case of the "Bank of the United States *vs.* The United States," (2 How., 711,) the suit was instituted upon an instrument drawn by the Secretary of the Treasury of the United States upon the French Minister of Finance in Paris, and was as follows:

"TREASURY DEPARTMENT OF THE UNITED STATES,
"WASHINGTON, *February* 8, 1833.

"SIR: I have the honor to request that at the sight of this, my first bill of exchange, (the second and third of the same tenor and date unpaid,) you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of four million eight hundred and fifty-six thousand six hundred and sixty-six francs and sixty-six centimes, which includes the sum of $3,916,666 66, being the amount of the first installment to be paid to the United States under the convention concluded between the United States and France on the 4th of July, 1831, (after deducting the amount of the first installment. to be reserved to France under said convention,) and the additional sum of nine hundred and forty thousand francs, being one year's interest, at four per cent., on all the installments payable to the United States from the day of the exchange of the ratifications to 2d of February, 1833.

"I have the honor to be, with great respect, your obedient servant,

"LOUIS McLANE.

"MR. HUMANN,
"*Minister and Secretary of State*
"*for the Department of Finance, Paris.*"

In discussing the character of this instrument, Chief Justice Taney, (pp. 762, 763,) after referring to the case of Jenney *vs.* Herle, (2 Ld. Raym., 1361,) uses the following language:

"Now, can any one read the bill in question and distinguish it in principle from the case of Jenney *vs.* Herle, or bring it within the definition of a bill of exchange, as given in Story on Bills. Upon the face of the bill it is drawn by the American Secretary in his *official*, and not in his private, character. It is drawn upon Mr. Humann, not for any money he was expected to pay to the American Secretary in his private capacity, but upon a particular fund which was due from the French nation, and which was presumed to be in his hands as the Minister of Finance. It is upon the credit to which the Secretary supposed himself to be officially entitled, on account of this particular fund, that he draws the bill. This is carefully and distinctly set out in the bill itself. It does not, in its terms, imply a personal or official credit not limited or applicable to particular circumstances. On the contrary, it claims the credit, and requests the payment, on account of the particular circumstance that the money was due from the

French Government, and the funds to pay it presumed to be in the hands of the Minister of Finance.

"Moreover, the Secretary knew, and the bank knew, that France was a constitutional monarchy, under which no money could be raised, or applied to any particular purpose, without the sanction of the legislative body; and that the money due from France could not be paid by Mr. Humann unless money was placed in his hands, and by law appropriated to that purpose. *The payment of the bill, therefore, depended upon that circumstance.* If that event had not happened—that is to say, if the money had not been provided by the legislature—and the *payment* authorized out of the fund thus provided then upon the face of the bill, it was evident that Mr. Humann could not, and would not, pay it. It is true that the bill assumed that the money was in his hands. But that was the case also in Jenney *vs.* Herle. Indeed. the bill there expressly stated the money to be in the hands of the drawee; yet it was held not to be a bill of exchange.

"It will hardly be said that this bill is to be treated as if drawn by the United States against France; but even if that view of the case could be maintained, it would not affect the argument. The bill claims no *general credit* for the United States with France that would give them a right to draw independently of the money due by the treaty. In any aspect of the case, the credit upon which the bill is drawn is expressly confined to this particular sum; and I cannot imagine how this instrument can be dealt with as a bill of exchange, if the rule is to stand that *no instrument is a bill of exchange in contemplation of law unless it implies a personal credit not limited or applicable to particular circumstances and events which cannot be known to the holder of the bill in the general course of its negotiation.*"

The same case again came before the Supreme Court in 1847, and the Court then held (5 How., 397, 398, 399, 400) that the instrument was not a bill of exchange, subject to the law merchant.

In Strader *vs.* Batchelder, (8 Ben. Monroe, 169,) the suit was instituted on an inland bill in the words and figures following:

"$500. LOUISVILLE, *April* 30, 1842.

"*To the Treasurer of Kentucky:*

"Pay to the order of H. Marshall, on the first day of July next, five hundred dollars, for value received, and charge the same to account of my salary as judge of the 5th judicial district.

"J. J. MARSHALL,
"*Judge of the 5th Judicial District.*"

"The writing upon which the present suit is founded was evidently drawn upon and in anticipation of the salary to which the drawer might be entitled as a public officer. It was drawn upon the treasurer of Kentucky as a public officer, and not individually. It was made payable precisely at that period of time when, according to statutory regulations on the subject, the salary of the drawer for the quarter next ensuing the date of the order was due. These circumstances conclusively manifest its character, and show that it was payable alone out of the salary of the drawer, that it was so intended when made, and that its payment by the treasurer was not expected unless the drawer should have a claim, at its maturity, on the treasury for its payment, on account of his salary as a public officer. Its payment, therefore, depended on a contingency growing out of the peculiar nature of the fund on which it was drawn."

It is submitted, therefore, that from these authorities, the following propositions are established:

First. That these bills purported to be drawn upon no other funds than that created by the contracts of the drawers with the Government.

Second. That their payment was contingent upon the existence of a particular fund, appropriated by Congress for that purpose.

Third. That were the fund exhausted they could not be paid, because they were not drawn upon the personal credit of the drawers, but upon moneys which it was expected would become due to them upon contracts not yet performed by them, and upon which the Government was not liable to make any payment to them, except as specified in their contracts.

These instruments not being bills of exchange under the law merchant, can be considered as nothing more than orders for money they *expected* to be entitled to receive under their contracts. They were *assignments pro tanto* of the amount the United States might ultimately become liable to pay them.

Being of this character, their negotiation and transfer was prohibited by the act of Congress passed February 26, 1853. (Chapter 81, Sec. 1, 10 Stats. at Large, 170.) That act provides that:

> "*All transfers and assignments hereafter made of any claim upon the United States*, or any part or share thereof, or interest therein, whether conditional or absolute, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, *shall be absolutely null and void*, unless the same shall be freely made and executed in the presence of at least two attesting witnesses *after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.*"

If it is intended by these instruments to transfer a portion of the amount to become due to the drawers of them under their contract, still they are prohibited; because, 1st, such transfer is not based upon any amount ascertained to be due; and, 2d, the order for its payment is not attested by the witnesses required by law.

THE APPELLANTS HAD SUFFICIENT NOTICE OF THE CHARACTER OF THESE DRAFTS OR BILLS OF EXCHANGE TO REQUIRE THEM TO MAKE INQUIRY IN REGARD TO THEM.

These drafts were drawn upon the Secretary of War in his official character. They were accepted by him in that character. They were of a character not hitherto unknown, circulated, or having currency in the commercial world. They were made payable at a place where, by the law, the Secretary of War could have no funds at his command to pay them, because he was prohibited by the act of August 6, 1846, from depositing any portion of the public moneys entrusted to him for safe-keeping, or disbursement, or transfer, in any bank. That portion of said act which contains this prohibition is as follows:

> "If any officer or other person charged by this act, or any other act, with the safe-keeping, transfer, or disbursement of the public moneys, shall convert to his own use, in any way whatever, or shall use by way of investment in any kind of

property or merchandise, or shall loan, with or without interest, *or shall deposit in any bank any of the public moneys* entrusted to him for safe-keeping, disbursement, or transfer, or for any other purpose, every such act shall be deemed to be an embezzlement of so much of said moneys as shall be thus taken, converted, invested, used, or loaned, which is hereby declared to be a felony." (9 Statutes at Large, p. 34, sec. 57.)

The Secretary of War, in accepting these bills, was acting in his capacity as a public agent, deriving his authority only from public law; and the law imposes on persons proposing to deal in securities of this character diligent inquiry whether the agent or officer had actual or implied authority to make them. The holders of these bills cannot, therefore, be regarded by the law as innocent purchasers of them, because the law implies that they had notice of the extent of the powers conferred upon the Secretary of War. In an opinion of Attorney General Butler, to which we have hitherto referred, there is this significant language:

> "Every citizen is chargeable with a knowledge of the law, and all persons who make contracts with the Postmaster General must be presumed to be acquainted with the extent of his powers, and with his departure from them, where his contracts or other acts are contrary to law. No person, therefore, can rightfully claim any benefit, as against the Government, *under a contract, or other act made or done* by the Postmaster General *in contravention of law.* Every such act is wholly void, and no legal right can be founded thereon."

In the case of the Mechanics' Bank against the New York and New Haven Railroad Company, (3 Kernan, p. 631,) the court, in discussing the question of agency, and determining to what extent a person holding (as endorsee for value) a certificate of stock issued by an agent without authority is an innocent party, used this language:

> "Whoever proposes to deal with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry he deals at his peril."
>
> "It is obvious, upon a moment's reflection, that negotiability can impart no vitality to an instrument executed under a power

where the agent has exceeded his actual or presumptive authority."

"Underlying the whole subject of agency, there is this fundamental proposition, that a principal is bound only by the *authorized acts* of his agents. He cannot be charged merely because another holds a commission from him and falsely asserts that his acts are within it."

These principles are further discussed in Story on Agency, p. 381, sec. 307*a*, where he uses the following language:

"In respect to the acts and declarations and representations of *public agents*, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter (as we have seen) the principals are in many cases bound where they have not authorized the declarations and representations to be made. But in cases of public agents, the Government or other public authority is not bound *unless it manifestly appears* that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, *or is employed in his capacity as a public agent to make the declaration or representation for the Government.* Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the *fraud, or mistake, or rashness, or indiscretion of their agents.* And there is no hardship in requiring from private persons dealing with public officers the duty of inquiry as to their real or apparent power and authority to bind the Government."

These principles are fully recognized in the following cases: State *vs.* Hastings, 10 Wis. Rep., 531, 535. Commonwealth *vs.* Fowler, 10 Mass. Rep., 30. Murray *vs.* Carothers, 1 Met., 165.

In the case of Cone *vs.* Baldwin, (12 Pickering, 555,) it was held "that the defendant is not obliged to prove that the holder purchased with full and certain knowledge of the want or failure of consideration. If the circumstances attending the transfer were such as to put him upon his guard, and he made no inquiry as to the consideration, he purchased at his peril."

In the case of Schneider against Reilly, (6 Barr., 168,) Mr. Chief Justice Gibson says that "the presumption of fairness in the negotiation of a note is not only of the slightest kind, but open to be blown away by the slightest breath of suspicion."

The same doctrine is also affirmed in the case of Hill against Kroftt, (5 Casey, 186.)

The facts appearing upon the face of these instruments, and of which persons purchasing them were bound to take notice, were:

First. That they were accepted by the Secretary of War in his official character. They were therefore bound to inquire whether such acceptances were authorized by law.

Second. That they were made payable at a place where the Secretary could not lawfully have any funds deposited on account of the Government of the United States with which to pay them.

Third. That they were based upon contracts which had been made under the direction of the Secretary of War for the purpose of meeting the necessities of his Department. The persons purchasing these bills, therefore, were bound to inquire whether the contracts on account of which these instruments were drawn had, at the time of their acceptance, been performed, because if they had not been performed the Secretary of War was prohibited, by the act of the 31st January, 1823, (Statutes at Large, p. 23,) from making any advances to these contractors in favor of whom these acceptances were made. That act provides—

> "That from and after the passage of this act *no advance of public money shall be made in any case whatever;* but in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment."

V.

THE EVIDENCE OFFERED ON BEHALF OF THE UNITED STATES WAS ADMISSIBLE TO SHOW THE CHARACTER OF THESE BILLS AND THE CIRCUMSTANCES UNDER WHICH THEY WERE ISSUED.

It is objected by the appellants that the United States may not rightfully make inquiry as to the consideration or circumstances under which the drafts on which they rely were issued. This proposition is undoubtedly correct as between individuals; it can have no application to the Government. The Government can never become an accommodation endorser or acceptor; individuals frequently do; and when individuals thus accept or indorse negotiable paper the law precludes any inquiry as to consideration of such bills as between the drawer and the acceptor or endorser, if taken in the usual course of business, and without notice. It was competent, therefore, for the United States to show upon the trial of this cause that these bills were issued solely for the accommodation of the contractors; that they were issued in violation of law, because, if they were issued for the purpose of advancing money to the contractors, prior to the actual performance by them of their contracts, then they were prohibited by the statute to which we have already referred. They were not purged of their illegal character by the fact of their endorsement. The endorsement of them would give them no greater validity than they possessed at the time of their acceptance by the Secretary of War. It is a well-settled principle of law, that the illegality created by statute exists not only where there is an express prohibition or inhibition of the act or contract, but also where it is implied by the nature and objects of the statute. (See Story on Promissory Notes, sec. 189, p. 207; Story on Contracts, p. 871.) It may be said that an innocent holder is entitled to recover, notwithstanding the note or bill may be affected by illegality or fraud. The exception to this rule is where the statute creating the prohibition has at the same time, either expressly or by necessary implication, made the instrument void in the hands of any holder, whether he has such notice or not. (Story on Promissory Notes, sec. 192.) Here the holders of these notes were required and bound to take notice whether or not these instruments were of the character that the Secretary of War might lawfully make. The evidence that these drafts or bills were drawn on account of contracts yet unexecuted and unperformed by the contractors; that they were for the personal benefit of the contractors rather than to meet the necessity of the Government; that it was not intended that the Government should ever be required to pay them; that to prevent them from being presented for payment at the War Department the trust funds of the Government were abstracted from their place of deposit; were all essential and legitimate facts which the United States might rightfully prove in order to show the character of the transactions out of which these drafts or bills of exchange came.

VI.

IN CONCLUSION, THE DEFENDANT SUBMITS THAT, BOTH UPON PRINCIPLE AND AUTHORITY, THE FOLLOWING POSITIONS HAVE BEEN CONCLUSIVELY ESTABLISHED:

A. That the Secretary of War is in no sense a principal; he is only one of the agents of the executive departments of the Government, with powers clearly defined and duties plainly indicated by law.

B. That the powers of a public agent are to be determined by law, and those powers are limited by the law to the performance of the specific duties imposed upon such agents; and his powers are to be construed with reference to the design and object of them.

C. The powers of a public agent being conferred and limited by law, all persons dealing upon the authority of such agent are chargeable with notice of the extent of his powers.

D. All the financial operations of the United States, all the bonds, bills, and notes issued by it, are required by law to be done by the Treasury Department, the sole agency under the law authorized to perform those functions.

E. No bond, bill, Treasury note, or other evidence of indebtedness can be issued, nor can any debt against the United States be created, except in virtue of a law of Congress. It follows, therefore, that the Secretary of War has no authority, in virtue of his official character, to accept bills of exchange and bind the United States for their payment.

F. That the issuing and use of the bills of exchange offered in evidence in this case, for the purposes disclosed in this investigation, was without authority of law.

G. That these instruments, being illegally and fraudulently issued, and the appellant having notice thereof before purchase, cannot derive any rights under them, by virtue of such purchase, for value.

H. These instruments were void in the hands of the drawers, because they were issued in fraud of law, and without consideration; and also because their acceptance was made by an agent (the Secretary of War) having no authority for that purpose, either express or implied.

I. These instruments being drawn upon and accepted by a known public agent of the Government, in his official capacity, are not bills of exchange subject to the law merchant.

J. Every order for the payment of money drawn upon any agent of the Government, in his official capacity, is drawn upon the Government, and such order cannot be paid unless there be an appropriation by Congress for that purpose.

In submitting this case to the consideration of the Court, it will not be necessary to invite special attention to the importance of the questions involved. It is seldom that questions so important and far-reaching in their consequences are submitted to the determination and judgment of courts. The question of the powers of public agents, not less than their duties and responsibilities, is to be determined. It is no insignificant power that is asserted for a mere military agent in this case. It is gravely claimed for him that the credit of the nation is at his disposal; that he may issue bills and contract debts, with no limitation upon his power but that of his own discretion. There are no subjects of legislation that have been watched with so much solicitude as the credit and finances of the nation. Commencing with the adoption of the Constitution, and running through the successive acts of Congress, we find repeated legislation upon these subjects. The statutes are filled with prohibitions and penalties against their wrongful use. It has been a favorite idea with courts, as well as the people, that there is no officer under the Constitution, from the President down to a disbursing clerk, who is invested with unlimited power over the money or credit of the nation. If the powers claimed for the Secretary of War in this proceeding shall be judicially recognized, the whole theory of the Government in this respect will be reversed, and the right of a mere military agent of the Government to involve it in debt judicially asserted. It is believed that powers so unusual and dangerous as claimed in this proceeding can never find judicial sanction here.

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